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ABSTRACT

This report contains the proceedings of the 1970 NOLPE annual meeting. Topics covered in the report include (1) the use of the strike in schools, (2) employer-employee relations, (3) desegregation through busing, (4) disparities in educational resources, (5) problems of land utilization, (6) parents rights with respect to the school curriculum, (7) special problems of land utilization, (8) the nontenured teacher and the Civil Rights Act of 1871, (9) legal and practical implications of decentralization, (10) student dissent, (11) church-State relations, (12) the legal status of student teachers, and (13) integration or segregation of "other" minority groups. (Author/JF)

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Critical Issues in School Law

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1

Table of Contents

	PAGE
The Analysis of a Strike.....*Jerry F. Halverson*	1
The Anatomy of a Busing Case.....*Benjamin L. Craig*	15
Disparities in Educational Resources and Outcomes, and the Limits of the Law.....*Mark G. Yudof*	38
A 'Birds-Eye View' of the Law Governing Employer-Employee Relations in Local Public School Districts in California...*Thomas A. Shannon*	53
Special Problems of Land Utilization.....*M. A. McGhehey*	56
Parents' Rights Vis-A-Vis School Curriculum .....*James W. Porter*	59
The Non-Tenured Teacher and the Civil Rights Act of 1871.....*Haskell C. Freedman*	72
Some Legal and Practical Implications of Decentralization .....*Norman Drachler*	82
Decentralization .....*Ben Hubbard*	95
Some Legal and Practical Implications of Decentralization .....*Bernard Shulman*	99
Campus Unrest and the Law..... .....*A. Kenneth Pye*	106
Current Legal Problems in Church-State Relations and the Schools.....*Donald E. Boles*	119
Special Problems of School Administration: The Legal Status of Student Teachers..*Bobby D. Anderson*	189
Special Problems of School Administration: School Board Policies—Classification and Updating .....*Walter L. Hetzel*	190
Special Problems of School Administration: Integration or Segregation of "Other" Minority Groups .....*Stanley G. Sanders*	194

FOREWORD

The National Organization on Legal Problems of Education celebrated its sixteenth anniversary at the annual meeting held in New Orleans on November 19-20, 1970. School board members, administrators and teachers, attorneys, professors of law, professors of educational administration, and others, assembled then in the largest number ever to attend a NOLPE meeting. They came from most of the states, the District of Columbia, and Canada to consider the critical issues facing our nation's schools.

This volume contains the proceedings of the 1970 NOLPE Annual Meeting. It makes available to all a wealth of material on the most challenging problems of our time—the use of the strike in school employer-employee relations; desegregation through busing; disparities in educational resources; decentralization; student dissent; and church-state relations, among others. We in NOLPE, are deeply indebted to the distinguished authors of the papers published here.

The year 1970 commenced a new decade and a turning point for NOLPE. During the year, NOLPE doubled its membership; it broadened its purpose to serve the school law and education communities by including colleges and universities among those for whom it will promote interest in and understanding of school law; and it fulfilled its obligation to serve as a clearing house for information by substantially increasing its research and publication activities.

"CRITICAL ISSUES IN SCHOOL LAW," together with Volume 1 of the NOLPE School Law Journal and Number 1 in the NOLPE Monograph Series, makes a significant, additional contribution to the literature in 1970.

JOHN PHILLIP LINN
NOLPE President, 1970

THE ANALYSIS OF A STRIKE

By Jerry F. Halverson*

INTRODUCTION

The four and one-half week strike of the Los Angeles City Schools last spring, conducted by the United Teachers—Los Angeles (UTLA), was the largest and longest teachers' strike California has yet experienced. The results of the strike have been difficult to assess, no matter where one might stand on the issue. Certainly it has affected the thinking and actions of every person and organization concerned in any substantial way with the schools.

The strike certainly created deep divisions among the teaching staffs of our 615 schools as well as within UTLA itself. UTLA has lost membership, and the two rival organizations, one which was virtually created through the efforts of teachers who opposed the strike, have become substantially stronger.

It also appeared to have an impact on the State Legislature, although not the kind some would have hoped. The Legislature had been deliberating on legislation designed to divide the School District into 12 or 24 subunits with local boards of education. That plan was adopted amid a great deal of negative legislative comment about the strike. (It was later vetoed by the Governor.)

The immediate result of the strike was, of course, the strike settlement in the form of a proposed contract, which is at least as comprehensive and as satisfactory to the teachers' organization as any yet adopted by any school district in the United States. The School District has also experienced multiple litigation over the strike. The cases were concerned with the role of certain members of the Board of Education, the validity of the proposed contract, and the organizational structure of the teachers' organization.

BACKGROUND TO THE STRIKE

For many years in Los Angeles, and in most other school districts in the State, the local affiliate of the California Teachers Association (NEA) and the American Federation of Teachers local

*Legal Adviser, Los Angeles City Schools. Presented to the National Organization on Legal Problems of Education, 16th Annual Meeting, November 19-20, 1970, Roosevelt Hotel, New Orleans, Louisiana.

have been in stiff competition for members. The AFT affiliates had been pressing school districts and the State Legislature to provide collective bargaining and a sole bargaining agent approach to employer-employee relations. The CTA affiliate had been fighting single bargaining agent elections and had been generally adverse to any approach to collective bargaining. With the expansion of teacher organization activity, and because of the difficulties experienced by local boards in their attempts to deal with multiple teacher organizations, the State Legislature adopted in 1961 a somewhat unique approach to school district employer-employee relations.

The most important provision of the 1961 legislation provided for a "Negotiating Council" to be established in each district which had two or more certificated employee organizations. The Negotiating Council may be comprised of from 3 to 9 representatives of certificated employee organizations. The number of representatives an organization may have is a function of its size relative to that of other certificated organizations that apply for seats on the Council. In Los Angeles the Council has 9 members, and this year an organization needed approximately 1,600 members to obtain a seat on the Council. The theory behind the legislation is that a board of education may exchange information and proposals with a single body, the Negotiating Council, rather than with multiple teacher organizations.

In 1969 the CTA and AFT affiliates in Los Angeles commenced negotiations looking toward some kind of a merger of the two organizations. In February of 1970 efforts in this direction were consummated with the creation of a new organization known as the United Teachers—Los Angeles. This organization became fully operative upon creation, and the old, underlying organizations were to pass out of existence on December 31, 1970.

Because of the size of its membership, approximately 23,000 out of a District of 26,000 regular day school teachers, UTLA representatives occupied all of the nine seats on the Negotiating Council.

Faced with a vigorous, militant, and apparently united teachers' organization, the Los Angeles City Schools decided to reorganize its efforts in the area of teacher negotiations and engaged a lawyer, experienced in the area of labor relations, as its negotiator.

Negotiations commenced in March. UTLA submitted a 67-page "Negotiating Package" and the school district's representative sub-

mitted a series of individual proposals and counter proposals relating to subjects contained in the UTLA negotiating package.

While the CTA and AFT affiliates had talked strike in the prior year and UTLA intensified such talk immediately upon its creation, few in the school administration really expected that a strike would take place last year. It was felt that there were too many factors running against the success of any strike action: the teacher organization had no strike fund, there was a philosophical division within UTLA, the State Legislature would obviously not be influenced affirmatively by any strike action, the public as a whole did not have a positive view of the current educational situation and certainly was opposed to any increase in taxes which would be necessary to raise teachers' salaries or to provide any of the other teacher benefits which the organization demanded.

Nevertheless, after only 8 formal negotiating sessions between the Board's negotiator and the Negotiating Council, UTLA obtained a strike vote on Friday, April 10, and the strike commenced on Monday morning, April 13.

NEGOTIATION PROCEDURES

Because we did not believe that there would be a strike, and because both the administration and the Board of Education wanted to develop some kind of comprehensive agreement with the Negotiating Council, we approached the commencement of negotiations in what we believed to be a businesslike way and in a manner best calculated to develop an initial agreement which would serve the interests of the schools and the teachers.

In addition to engaging an experienced and highly qualified attorney from private industry to represent the District in negotiations, we provided him with a full-time assistant from our staff who had an overall knowledge of the District, experience in working with the employee organizations and background information as to the strengths and weaknesses of the organizations and their leaders, their attitudes and tactics.

We also provided the negotiator with an eight-man committee of technical experts who could provide him with information and analysis in every major area falling within the negotiation process.

The negotiator and his team met with the Board of Education and the Superintendent prior to the commencement of negotiations to discuss projected issues and in order to provide the negotiator

with authority to accept or reject proposals within certain limitations. He also reviewed with the Board his initial proposals in order to gain direction.

In order to organize our thinking and as an aid to planning, we developed a chart which, among other things, estimated and analyzed:

(a) Objectives desired by the teachers' organization as an outcome of negotiations.
(b) Objectives deemed indispensable by teachers' organization.
(c) Goals desired by School District.
(d) Projected course of negotiations.

We also adopted certain procedural techniques common to all negotiations, such as the following:

(a) Nothing would be settled until all issues are settled. In this way items can be re-opened and traded if later issues so require.
(b) Newsletters were issued and press conferences were held concerning the progress of negotiations in order that employees and the public would be kept informed of our position and intentions.
(c) The Superintendent and Board of Education were kept away from the bargaining table, and away from the back door negotiations and end runs by the organization in order to avoid its attempt to gain something from the Board which it could not gain through negotiations. (The classic ploy utilized by the organization was to claim that the Board's negotiator was "stalling," was not "negotiating in good faith," or lacked the authority to come to any binding agreement at the bargaining table.)

Formal meetings with the Negotiating Council (UTLA) representatives commenced on March 12. We met formally no more than twice each week, with a few additional, informal meetings. All meetings were held in neutral quarters and in private.

At the second formal meeting with the Negotiating Council we were presented with a 67-page "Negotiating Package" containing a list of 474 demands. It is our feeling in retrospect that the Council did not intend immediate, realistic negotiations over the items in its package, but instead wanted to give the appearance of negotiations to the public and to paint the District as "stalling" and "foot-dragging" in order to develop the premise for the strike.

We believe that UTLA felt it needed a strike in order to weld together its newly merged membership and to flex its muscle in order to show the Board of Education, the State Legislature, and the public that it had become a potent force in the school system.

We believe this was true because there was no realistic response to our attempts to negotiate on items contained in the 67-page package. For example, we asked which of the items might be considered priority items by UTLA in order that we might commence concrete discussions. We were advised that all of the 474 items were of a priority nature. In addition to this kind of response, there was a great deal of posturing and playing to the news media in an apparent effort to characterize the District as the villain.

These efforts are not necessarily to be criticized as they are generally legitimate and useful tactics in the bargaining situation. The criticism, I think, should be directed at us, because we failed to recognize that these maneuvers were the prelude to the strike. As I mentioned earlier, we simply did not believe that UTLA would call a strike in the face of so many adverse factors.

After building up a public position that negotiations with the District were not progressing due to the unwillingness of the District or its negotiator to bargain in good faith, UTLA took a strike vote of its membership on Friday, April 10. The vote was affirmative, and the strike commenced on the following Monday, April 13.

COMMENCEMENT OF THE STRIKE

When we learned on or about March 25 that it was very probable that the organization intended to take a strike vote of its membership (although we did not know at that time when the vote would be taken), we discussed with the Board of Education various efforts to mitigate the effects of the proposed strike on the schools. I think it is interesting that the item which received the most emphasis in these discussions, but unfortunately was the least effective, was an injunction. We decided to go after only the organization and its leadership and not to serve teachers or middle echelon strike management. If we have to seek another injunction in any future strike, we intend to broaden the group of persons served for reasons mentioned later on.

Development of Strike Plan. In consultations with the attorney whom we engaged as our negotiator and labor relations expert we developed, during the week of March 25, a "Strike Plan" which was intended to utilize every available School District resource in order to reduce the effect of the proposed strike. Included in this strike plan were the following elements:

(a) A determination of the probable length of the strike, as many impor-

tant aspects of preparation depend on this factor.

(b) A decision as to the conditions under which schools would close and who would have the authority to close them. This item is, of course, of paramount consideration, since the immediate objective of the strike would be to close the schools and thereby increase the pressure on the Board of Education to meet the organization's terms. Decisions were also made as to the related question of combining classes within a school, and, where necessary, a method of consolidating two or more schools in one school plan so as to make maximum utilization of school personnel. This latter procedure did, of course, require a standby pupil transportation plan.

(c) The development of a plan for the use of substitute teachers and non-teaching personnel as teacher replacements. Included in this plan were methods of using, and specific school assignments for, administrative and supervisory personnel, and procedures for the assignment of teacher aides and parental volunteers. I might insert a caveat at this point. Many states have some kind of statutory provision with respect to advertising for the recruitment of employees during a strike. California has two such provisions which provide, in effect, that if an employer advertises for employees during a strike, without stating in the advertisement that a strike is in progress, he is guilty of a misdemeanor. While such statutes may not apply to public agencies, legal counsel would be well advised to review such provisions before advertising for assistance during the course of a strike.

(d) Developed special instructions to the school principal and provided him with standby operating procedures, and provided suggested methods of meeting anticipated difficulties. The need for this type of planning cannot be overemphasized. Experience proved that, although the planning which we did in this area was good, not enough effort was made to define, and provide solutions for, anticipatable problems. Many of the really critical problems developed on the school site, and unless a principal has had experience in the techniques of confrontation and militant group activity, he is not able to effectively deal with the problems without outside help and counsel.

I might make another comment, also, on the role of the principal during a strike. He is truly the man in the middle. In the Los Angeles strike situation, he had to operate the school when one-half of his teachers were outside seeking to close it down. He has had to deal with angry parents and community groups supporting the strikers and other angry parents and community groups supporting the School District. It has been necessary for him to conciliate differences, frequently very bitter differences, among his faculty members after the termination of the strike. Not infrequently he has been required to assist in gathering evidence, and sometimes testify, against members of his teaching staff because of their picket violence or other disruptive activity during the strike. While his role sometimes appears to him to be an ambiguous one, he is nevertheless a part of management and must, in every instance, carry out the policies of that management.

(e) Anticipation of the nature and extent of support which non-teaching employees will provide to the strikers. That is to say, contingency

plans must be developed in case bus drivers, custodians, cafeteria employees and others whose assistance is needed in order to keep the schools open, decide to honor the picket lines or otherwise refuse to carry out their responsibilities. In addition we had to anticipate the possibility that segments of organized labor would sanction the strike, and if so, whether such sanctions would cut off the delivery of essential supplies to the schools. Further, it is necessary to identify other groups and organizations who will be probable allies of the strikers. In this area experience shows that we could anticipate parent organizations, members of the news media, and certain elected officials would provide assistance to the teachers' organization and to the strikers.

(f) A decision as to whether or not an injunction would be sought, what kind of activities would be enjoined, and who would be served. When seeking an injunction, the School District recognized that it had an obligation to the courts, should the injunction be violated, not to permit potential contempt proceedings to be negotiated away in any strike settlement. We recognized the importance of pointing out to the Board of Education that if it decided to seek an injunction, it should be prepared to enforce the injunction against every violator, recognizing that the teachers' organization would probably ignore the injunction and that the School District would be required to proceed against the union leadership by way of contempt proceedings.

(g) Anticipation of difficulties which might be created by striking teachers for non-striking employees and the development of plans to protect employees should such difficulties arise. Included within this area were such items as the possibility of punitive action taken by other unions against non-striking employees in connection with their after-school employment, damage to vehicles in school parking lots, and withholding by striking teachers of necessary items such as class roll books, and classroom and closet door keys.

(h) The development of specialized communications, and the expansion of existing communications media, with non-striking teachers and the general public. This is an extremely important area. We should recognize that collective bargaining as it relates to the public schools is a multi-party, or multi-faceted, process, where each of the two principals, while negotiating with each other, are carrying on a kind of negotiation process with the voters, the taxpayers, the uncommitted teachers, and with parent groups. The interests of all of these groups must be considered in the bargaining process. As a matter of fact, one party or the other may openly seek an alliance with one or more of these other, collateral parties.

(i) The development of a plan for picket line control, particularly as picketing may relate to access to the school plant by pupils and non-striking teachers, the propagandizing of students, and the harassment of non-striking teachers. While this item of strike planning relates to the development of instructions and assistance to the school principal, it is of sufficient importance to receive independent consideration.

(j) The development of a procedure for the continuous exchange of information among that portion of the administrative staff which must

make decisions in relation to the strike. With the district as large as Los Angeles, and being partially decentralized with some of the important administrative offices physically separated from the central administrative office, it was necessary for the top administrative staff, among other things, to meet every morning at 7 o'clock and for the superintendents in each area to meet every evening.

Strike Activities. The organization was successful in gaining the support during the first week of the strike of 13,200 teachers. This figure declined slightly almost daily until May 13, the last day of the strike, when the number of teachers out on strike was approximately 10,650.

The teachers' organization conducted the strike mainly from its office building and maintained the usual strike coordination activities at that location. Generally, UTLA divided the 615 schools into a number of "clusters," each of which was assigned a cluster leader. Each school was in turn assigned a strike or picket captain.

Meetings of picket captains for each cluster took place almost daily with their cluster leader. Instructions, leaflets and other literature were distributed to the captains for dissemination at their individual schools. Combined with other communications provided by the UTLA offices, this communication network appeared to operate in an efficient manner.

There were also meetings from time to time, in various areas of the School District, designed to maintain the enthusiasm of the striking teachers and to provide them with an opportunity to hear statements directly from the organization's leaders.

Generally, the striking teachers, on or off the picket lines, conducted themselves in a lawful manner and were not discourteous or hostile to the non-striking teachers. However, in some cases, the harassment of non-strikers took all of the varied forms that ingenuity and the intensity of the situation could develop. Included were threats of immediate and subsequent physical harm, late night telephone calls, damage to automobiles, verbal and written insults, the blocking of exits and entrances to faculty parking lots, advice to students, particularly on the secondary level, that they should disrupt classrooms and create other problems for non-striking teachers, and generally generating and encouraging disrespect in students for non-striking teachers. A number of individual criminal and civil actions between striking and non-striking teachers have resulted from this kind of activity.

Although approximately half of our teaching staff was out on strike during the four and one-half weeks of the strike, a large number of students also decided not to attend school during the strike period. While the absence of pupils hurt us from the standpoint of receiving state apportionments based on the average daily attendance of pupils, it provided some relief to the badly understaffed schools.

In order to meet the staffing problems created by the strike, the school developed local plans to meet their individual needs. These plans were surprisingly effective in most instances, and included the following:

(a) The giving of priority attendance to 9th and 12th graders on the secary level and the teaching of different grades on different days.
(b) The holding of legally minimum sessions in the morning and in the afternoon at the elementary schools.
(c) The holding of classes only for those children whose teachers were not striking or where substitutes were available (this procedure had the unintended, but desirable, result of directing parental pressure against the striking teachers).
(d) The utilization of alternate plans of operation depending upon the number of teachers present. That is to say, some schools had a plan "A", a plan "B", and a plan "C" which could be put into operation immediately in the morning depending upon the staff available to the school.

Many schools operated with a full program and with no loss of time at all, because few, if any, teachers were on strike.

The strike plan, which we developed, mentioned earlier, worked very well and permitted us to avoid a number of potentially serious problems.

LEGAL EFFORTS

On April 13, the morning of the strike, we sought and obtained a temporary restraining order prohibiting the strike and direct activities in support of the strike. As we all know, the restraining order must be served on each individual who is to be enjoined before it has any legal effect. Because the organization's leaders knew that we intended to serve only them and the organization, they took up residence in a hotel and conducted strike coordination activities from that location. We had difficulty locating them, and therefore were not able to complete the making of service until late Tuesday afternoon. In the meantime, the organization's leader had made a number of heroic statements on television and over the radio and were generally advising the striking teachers

that they would violate the injunction, that it was probably unconstitutional and would be tested through later court procedures, and that the strike would go on regardless of the restraining order or any other injunctions which might be obtained.

Based upon a number of such television presentations, we brought the leadership in on a show cause hearing re contempt and showed the various television films to the Court. The Court felt, and I think correctly, that a union leader could not be held in contempt of court for engaging in verbal heroics and campaign rhetoric.

We thereupon set out to develop evidence of specific and concrete conduct on the part of the leadership which could be shown to be clearly in violation of the restraining order. We engaged a firm of private investigators and installed certain loyal teachers in the UTLA headquarters. By the time of the hearing on the preliminary injunction, which was obtained on May 4, we had enough evidence for successful contempt proceedings.

For a variety of reasons, the trial on the order to show cause re contempt was put over until last September . In the process of developing stipulations as to foundational material with the lawyers for UTLA, it became apparent to them that we could prove, without question, a number of violations of the TRO and of the preliminary injunction. In order to avoid the time and expense of a trial, the organization agreed to stipulate that it and its leaders had committed 12 violations of the restraining order.

This stipulation was presented to the Court, which had the option of sentencing each defendant to 5 days in jail for each violation, assessing a fine of $500 for each violation, or both. The Court decided not to sentence the leaders to jail as it appeared to the judge that some of them were seeking a martyrdom status and that a jail sentence would serve no purpose. He did, however, assess the maximum fine.

NEGOTIATIONS DURING THE STRIKE

With the commencement of the strike on Monday morning, April 13, the Superintendent instructed the negotiator to terminate any further negotiations with the Negotiating Council representatives (UTLA) and not to recommence until the strike had been terminated. After about a week, however, the pressures on the Board of Education to recommence negotiations became so intense that

the Superintendent recommended to the Board that the services of a mediator be obtained.

We first sought the assistance of the Federal Mediation and Conciliation Service. However, that body indicated that it could not provide assistance unless the parallel state organization would permit the introduction of the federal service in a local dispute. Before any attempt was made to contact the state service, negotiators for the Board and UTLA decided, on April 23, to retain an independent expert of national reputation. This mediator met with the parties jointly and individually almost daily from April 27 through May 2. He was, however, unable to develop a realistic base for the resumption of negotiations and stated that he would withdraw unless each party could develop and submit to him, by May 6, an agreement which reasonably promised to be acceptable to the other side. It was his proposal that from the two agreements he would develop a third proposal which both parties could accept.

The Board of Education, and presumably UTLA, presented the mediator with a proposed agreement, and on May 8, he provided to each party his own third form of a proposed settlement agreement. While the mediator intended to withdraw at this point, the Board and UTLA persuaded him to remain and to assist both parties in coming to final agreement on the mediator's proposal.

Finally, after two extremely lengthly mediation sessions, one of which lasted until 5 a.m. of the morning of May 12, the Board of Education and UTLA agreed upon a proposed contract. On Wednesday, May 13, UTLA announced the termination of the strike, and the striking teachers returned to work on the following day.

AFTERMATH OF STRIKE

While the Board of Education and UTLA were satisfied with the settlement agreement, many teachers and taxpayers were not. While the Board was preparing to publicly present and adopt the proposed contract, rival teachers' groups and taxpayers sought and obtained a preliminary injunction against the adoption and implementation of the contract. Although we obtained a relatively early trial date on the matter, the Board felt that the agreement, as finally developed, was a good one and should be implemented even if it could not take the form of a binding, bilateral contract. The Board caused the substance of the contract to be put into the

format of a Board rule, and proceeded to deliberate on the adoption of the agreement in that form.

However, another taxpayers' group filed a separate lawsuit seeking to enjoin the Board from adopting the settlement agreement in the form of a Board rule or policy. Much to our surprise, the Court issued a restraining order on May 28 on the basis that the proposed rule had not received adequate distribution among the employees who would be affected by it.

We thereupon printed and distributed to the various schools and offices over 3,000 copies of the proposed rule. Nevertheless, the plaintiffs were successful in extending the restraining order on two subsequent occasions, and the Board decided that it would not attempt to deliberate further on the adoption of the rule until a trial was held on the merits of the action.

The trial commenced in the middle of July on 4 of the 5 lawsuits which arose out of the strike, including those challenging the validity of the proposed contract and the proposed rule, and continued through the middle of August. The Court held against the Board of Education in every lawsuit and on each of the issues. The thrust of the Court's decision was that the Board, lacking statutory authority to engage in collective bargaining and having nevertheless done so in an effort to settle an illegal strike was, in its effort to enter into a settlement contract, seeking the fruit of the poison tree, and that the contract was, therefore, in violation of public policy. Further, the Court held that in each important instance, the proposed contract illegally delegated portions of the Board's authority to the teachers' organization.

The Board has decided to appeal from the decision and to seek from the State Supreme Court a writ of prohibition prohibiting the trial court, pending the course of the appeal, from entering a judgment and issuing an injunction restraining the Board from adopting the substance of the contract as a Board rule.

The strike has also produced negative results among the teaching staff. The divisiveness within teacher ranks which developed during the strike has severely hurt faculty morale at many schools. Militancy during the strike caused significant emotional wounds, many which continue to fester. In some instances, principals predict that it will take several years to heal the hard feelings engendered by the strike.

Aside, however, from the problems in the area of faculty morale,

the District and the pupils, many believe, suffered very little as a result of the strike.

Make-up time was provided for those students who missed classes and the District actually saved approximately $11 million in salaries as a result of not paying the teachers who were out on strike.

CONCLUSION

Strikes of public employees cannot be effectively prohibited by anti-strike legislation or by court injunctions. The teachers' organizations are not deterred by the threat of contempt proceedings or by public condemnation. New approaches and techniques are needed, some of them are being developed. Collective bargaining or employer-employee relations in the public sector is entering a decade in which will exist an intense need for thoughtful and comprehensive legislation to deal effectively with growing public employee unionism. I think it is obvious to everyone that the 1970's will see nearly as many changes in employee relations in the public sector as the 1930's brought forth in the private sector. This increase in activity in the public sector will take place for a number of reasons. One of the principal reasons is that there are approximately 20 million unorganized employees in the white collar, technical, and clerical-type positions. Many of these positions are in government. The potential income through payroll checkoffs to labor organizations, coupled with the gradual loss in blue collar membership, constitutes a compelling reason for union organizing drives. Another principal reason for increased activity in the 1970's is that today's students, who will be the managers and employees of tomorrow, have already been involved in collective action on the campus and believe in that technique as an effective tool for change. They will carry this attitude with them into governmental services.

Legislation in the public sector will be needed to:

(a) Carefully define the nature of the bargaining unit.
(b) Describe the scope of, or objectives to be involved in, the bargaining or negotiating process.
(c) Develop effective restrictions on strike activities such as:
    1. Mandatory loss of checkoff privilege for 6 months to a year after strike.
    2. A substantial statutory penalty that cannot be negotiated away in the strike settlement.
(d) Develop an effective means of adjusting employee grievances. None

of the procedures presently utilized, including fact-finding and advisory or compulsory arbitration, have been satisfactory either to public agencies or to employee groups.

Since school districts are apparently headed toward some form of collective bargaining or collective negotiations with their teachers and other employees, attention should be given, as the process develops, as to whether collective bargaining and the increased demand for greater control over working conditions, salaries, and educational programs and objectives, will actually benefit the students.

If administrators and teacher groups are polarized into warring camps, the quality of education cannot help but suffer. Collective bargaining offers no cure all for the problems besetting education, and there is nothing inherent in it which will bring about the needed improvements in education.

Collective bargaining or collective negotiations can work and can avoid being a negative and a uselessly complicating factor if both parties desire the process to work and understand its limitations. Certainly if it does not become a productive factor in education, other approaches will be developed, as the public's desire for educational improvements is unyielding.

THE ANATOMY OF A BUSING CASE

By Benjamin L. Craig*

Our topic today is "The Anatomy of a Busing Case," and I have in mind a specific case. The Denver newspapers called it the biggest story of the year 1969. *"Keyes, et al. v. School District No. 1, et al.,* was a class action against the Denver School District, its Board of Education, and its Superintendent, alleging racial segregation in the Denver Public Schools.

I. Definition of Busing

Before we discuss the case, it might be well if we defined the term "busing." Busing, to say the least, is controversial. It is so controversial that we can't even agree on its spelling. Some people use one "S" and some use two. Webster accepts both. I prefer one in order to distinguish it from the German word "buss," meaning kiss.

In any event, it is a poor gerund, meaning to transport by omnibus. Specifically, it is used in modern parlance to mean transportation of children to and from school by bus. In rural areas where long distances are involved, it is a well accepted and often demanded practice.

Some states have laws requiring school districts to furnish transportation for children living fixed distances from school. Other states leave the matter to the discretion of the local school district. This kind of transportation is not generally thought of as busing.

Since the school segregation cases, beginning with *Brown v. Board of Education of Topeka,* the term has taken on a different meaning. It connotes an element of compulsion, the forcing of one to do something against his will, as in compulsory busing, or, worse yet, compulsory cross-busing.

Generally, wherever a court finds that a school district is segregating pupils according to race in violation of the Constitution, it orders the situation to be remedied by desegregation. This usually involves some plan prepared by the school district, and approved by the court. These plans often include transfer plans, redrawing school attendance boundaries, creation of satellite zoning, pairing of schools and other devices. The busing comes in as a result of

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*Member Henry, Cockrell, Quinn and Creighton, Attorneys for the Denver, Colorado Public Schools. . .

underlying state law or local school policy as the only practical means of getting children from their residences to their schools of assignment where great distances are involved.

When school districts offer voluntary transfers and provide free transportation for those who elect to transfer, this is not generally regarded as busing, even when the purpose is to integrate schools. This is because of the absence of the element of compulsion.

In recent arguments before the Supreme Court in the *Charlotte-Mecklenburg* cases, Mr. Justice Black posed an interesting question: Would the Constitution be violated if the state of North Carolina simply discontinued the practice of providing free transportation for any of its school children? I'm not sure the Court will answer that one, but I hope it does give us some answers to other important questions before it.

II. Setting

Before I get into the lawsuit proper, I should give you a bit of a setting.

Denver, like many cities across the country, has experienced rapid growth both during and since World War II. In 1940, its population was 322,000. By 1960, it had reached 494,000, and the 1970 census reported that the City and County of Denver proper had a population of approximately 525,000, and the entire metropolitan area has a population of approximately 1.2 million.

Politically, Denver was organized as a city and county by constitutional amendment in 1902. That amendment also provided that the city and county would always be served by one school district with boundaries co-terminous with the city and county.

Geographically, Denver is roughly square, approximately 11 miles north and south and 9½ miles east and west, or approximately 100 square miles. The South Platte River flows from the south to the north through the city a short distance west of the city center. Denver's growth has been to the east and southeast over the past 25 years, much of it by territorial annexation of undeveloped land and subsequent development, primarily for residential uses, neighborhood businesses, and shopping centers. Annexations, all of them since World War II, have totaled approximately 62 square miles.

Demographically, the city is most densely populated near its center and north and west of its center. Negroes were concen-

trated in a rather small area immediately north of the center of the city in the 1940's. Spanish Americans or Hispanos were concentrated further to the north and to the west of the city center.

These are also the areas of the lowest family income, according to 1960 census figures. After World War II, the Negro population started to expand and migrate directly to the east. It reached Colorado Boulevard, about half-way to the city limits, in the late 1950's, and then moved on eastward through middle and upper middle class residential areas to the city limits during the 1960's.

During this time, the Negro population grew in percentage from 2.4% in 1940 to 6.1% in 1960. The percentage of Negro school enrollment increased more rapidly because of larger families of school age children.

As I mentioned, the school district was created in 1902 along with the city and county, and its boundaries were co-terminous with those of the city and county. It is governed by a seven member Board of Education who are elected at large for staggered six year terms. The Board has always maintained a neighborhood school policy, that is, a policy of requiring all children living within the defined attendance areas of a school to attend that school. It has never assigned children to schools based on their race. There is no state law requiring the transportation of children to school, but the Board has a policy of providing transportation for elementary children living more than 1½ miles from school and junior high children living more than 2 miles from school. About 10,000 children are transported under this policy. No transportation is provided for senior high students.

Because of the growth of the city population, the school enrollment doubled from 43,960 in 1946, to 86,951 in 1959. Then it went on up at a more gradual rate to 96,260 in 1965 and has leveled off since then at 96,634 in 1970. During this time, the District spent over $100 million for school buildings, and now operates 117 schools, 92 elementary, 16 junior high, and 9 senior high schools.

The estimated ethnic distribution of elementary school children in Denver in 1962 was: Anglo - 72.4%, Negro - 10.3%, and Hispano - 16.3%. In October, 1970, the distribution was: Anglo - 58.8%, Negro - 15.5%, and Hispano - 24.0%.

The District Judge who heard our case never quite got over the fact that all whites were called "anglo" by the plaintiffs. On the last day of the trial, he remarked to a witness:

"You know, of course, that they put the Irish in the same category as the

> Anglos; an astonishing conclusion. They have never before in history been called Anglos, prior to this trial."

Whites of other national origins might have been equally astonished to learn that they were called Anglos by the plaintiffs.

III. Events Leading up to the Lawsuit

Events leading up to the lawsuit in June of 1969, are important to an understanding of the facts of the case and comprised most of the evidence in the case.

Of course, the leading school segregation case of *Brown v. Board of Education of Topeka,* handed down by the Supreme Court of the United States in 1954, aroused interest in Denver, but not too many people thought it had any application since Denver has never maintained a dual school system.

Then, in 1956, a citizens committee was formed to fight proposed boundary changes for Manual High School and Cole Junior High School, both newer schools in the north central part of the city near heavily Negro residential neighborhoods. Old Manual High School had been replaced by a new building on the same site in 1953, was operating under capacity when it opened, and the Board adopted new boundaries in 1956 to better utilize the capacity of Manual and relieve overcrowding at nearby East High School. At that time, Manual had a Negro enrollment of approximately 42%, and East High had a Negro enrollment of approximately 2%.

The boundary change was made by the Board of Education in June of 1956, and the citizens committee threatened to bring an action in July, alleging that the boundaries had been "gerrymandered" and reflected a design by the Board to keep Negroes out of East High School and two Junior High Schools.

By 1958, the eastward Negro migration was nearing Colorado Boulevard, a north-south arterial street and state highway about midway between the city center and its eastern boundaries. Larger families of school age children concentrated in this area were causing over-crowding in the elementary schools west of Colorado Boulevard, and it was necessary to transport some children by school bus to Park Hill Elementary School east of Colorado Boulevard. Many of these children were Negro, and Park Hill, at that time, was almost totally white except for the transported children. Since the school administration did not permit racial identification of school children on school records fearing that this could be

considered a racial classification prohibited by the Colorado Constitution, it was never established how many of the transported children were Negro.

To alleviate overcrowding of elementary schools, the Board authorized construction of a new elementary school on the south end of a large site acquired by the Board in 1948 for a junior high school and an elementary school. The new school, Barrett Elementary School, opened in 1960. The racial composition of the school was never established because of the lack of records, but it was conceded that its pupil membership was predominantly Negro. The eastern boundary line of the new school's attendance area was set on the west edge of Colorado Boulevard so that children would not have to cross a six-lane highway. At the time Barrett opened, other schools east of Colorado Boulevard had significant numbers of Negro children, although the exact numbers and percentages are not known.

Some Negro leaders objected to the location of Barrett School and suggested, as alternatives, additions to existing elementary schools west of Colorado Boulevard to alleviate crowding in those schools.

By 1962, two years after Barrett opened, the Negro migration had caused overcrowding in the junior high schools, and the Superintendent of Schools proposed to the Board of Education that it implement its tentative plans to construct a new junior high school on the north end of the large site at approximately 32nd Avenue and Colorado Boulevard. The south end of that site was then occupied by Barrett Elementary School, which, at that time, was 79.2% Negro.

In May, 1962, the schools started to keep records of Negro, Hispano, Oriental and other students, based upon a count made in the classrooms by the school principal or a person appointed by him, during the fourth week of school. Individual pupils were not identified by race. All data showing the estimated racial and ethnic distribution of pupils used at the trial was compiled each year in this manner, and the method is still in use.

The proposal for the new junior high school was made after the case of *Taylor v. Board of Education of New Rochelle*, 294 F.2d 36, had been decided by the Second Circuit in 1961. Very briefly, that case held that the Fourteenth Amendment was violated when a school district deliberately gerrymandered attendance boundaries

of schools on the basis of the race of the residents, with the purpose and effect of producing a substantially segregated school.

The proposal met with immediate opposition by a number of organized groups who feared that the new junior high school would open with a high percentage of Negro students. The groups had different axes to grind, and one of them was a group of white residents of the area who feared that the new school would cause an exodus of the white families from the area. Other groups suggested legal action, and yet others asked the Board to appoint a special committee with citizen representation to look into the situation and make a report to the Board.

In June of 1962, the Board deferred action on the proposal and created a Special Study Committee on Equality of Educational Opportunity in the Denver Public Schools with a charge to study and report the present status of equality of educational opportunity in the schools in the specific areas of curriculum, instruction and guidance, pupils and personnel, buildings, equipment, libraries and supplies, administration and organization and school-community relations. The study was to give special attention to racial and ethnic factors.

The committee was composed of a chairman and vice-chairman, three residents of each of eight high school areas, six Denver Public Schools staff members, and, as ex-officio members without vote, the School Board members, the Superintendent and the Deputy Superintendent.

The committee made an exhaustive study and gathered together in its report much data not previously compiled by the District. Generally, the committee found that the School District was doing a good job of educating the children of Denver, that its facilities were equal, that residential *de facto* segregation existed in Denver but that the School system had not created this situation, and that transportation of pupils for the purpose of integrating school populations was regarded as impractical, although both the schools and the community had a responsibility to eliminate the effects of *de facto* segregation.

The committee made many specific recommendations for improvement of the school system, and most all were accepted and implemented by the Board. They included a written pupil transfer policy; a limited open enrollment policy; the creation of a department of school-community relations; policies on establishing

school attendance area boundaries which would take into account racial factors as well as geographical factors in order to obtain, to the extent possible, a heterogeneous community; elimination of optional attendance areas; human relations training for principals; assignment of teachers and administrators without regard to race; team teaching and teacher aides; remedial reading and other programs.

During the course of the deliberations of the Special Study Committee, we were called upon by the Superintendent to provide him with a memorandum of the then current state of the law for his use and for the use of the committee. That memorandum and its supplements considered the cases and the duty of the School Board when the report and recommendations of the study committee were presented showing racial and ethnic data not previously known to the Board. Our conclusion was that the Board could no longer be "color blind" once such information became available to it, and whenever a decision was to be made and all other factors were equal, it should choose the alternative which would tend to alleviate the *de facto* segregation in the schools rather than make it worse, because to choose the alternative, which would make *de facto* segregation worse, could be considered as evidence of intent to segregate *de jure*. We also concluded that the Board had no constitutional duty to change a *de facto* situation which it did not create.

In 1965, the chairman of the Special Study Committee and one member of that committee, a Negro housewife, were elected to the Board of Education for six year terms.

Before the study committee was appointed, the Superintendent made some minor boundary changes in some of the northeast Denver elementary schools in order to alleviate overcrowding. Later, in 1964, more minor boundary changes were made in the elementary schools in northeast Denver, and some major boundary changes were made in the junior high schools of the area to accommodate growing numbers of junior high students in northeast Denver. These changes resulted in a good deal of integration in the junior high schools. For instance, a portion of the area west of Colorado Boulevard and north of City Park was detached from predominantly Negro Cole Junior High School and assigned to predominantly white Gove Junior High School.

In 1966, the Board of Education, in response to claims that the major civil rights organizations were not represented on the

Special Study Committee, and the need for advice on other matters such as the location and financing of new school buildings, created an advisory council. The Council was badly split on philosophical grounds, and because of this it was not very productive. The split caused a minority report to be filed. The majority did recommend a school capacity study, a cultural arts program, a superior schools program for two junior high schools, and educational centers. The chairman of the advisory council and the author of the minority report were elected to the Board of Education in 1967.

In May of 1968, after hearing many citizens, pro and con, the Board of Education adopted Resolution 1490 by a 5 to 2 vote. The two dissenters were the members of the Advisory Council who were elected in 1967. Resolution 1490 is better known as the Noel Resolution, named for its author, Mrs. Rachel Noel, the only Negro member of the Board. It provides in part:

> "Therefore, in order to implement Policy 5100, the Board of Education hereby directs the Superintendent to submit to the Board of Education as soon as possible, but no later than September 30, 1968, a comprehensive plan for the integration of the Denver Public Schools. Such plan then to be considered by the Board, the Staff and the community and, with such refinements as may be required, shall be considered for adoption no later than December 31, 1968."

The policy referred to, No. 5100, had been adopted in 1964 in response to the first study committee recommendations, and provided in part:

> "The continuation of neighborhood schools has resulted in the concentration of some minority racial and ethnic groups in some schools. Reduction of such concentration and the establishment of more heterogeneous or diverse groups in schools is desirable to achieve equality of educational opportunity. This does not mean the abandonment of the neighborhood school principle, but rather the incorporation of changes or adaptations which result in a more diverse or heterogeneous racial and ethnic school population, both for pupils and for school employees."

The Superintendent engaged educational consultants who were of some help, but the bulk of the 120 page plan, entitled "Planning Quality Education," was developed by two members of his staff with his guidance.

The plan called for a number of measures to bring about contact and understanding between pupils of diverse racial, ethnic and socio-economic backgrounds, but the principal vehicle was the model-school complex, chiefly a different means of administering to local schools. It linked several schools together with a common

administration and a sharing of facilities. Thus, the 92 elementary schools would be organized into 12 elementary school complexes. This would achieve some degree of racial and ethnic integration within the complex.

The plan also provided for voluntary open enrollment with transportation provided for transferring students, provided that there was space available in the receiving school and that the transfer improved integration.

Phase I of implementation of the plan required immediate implementation of the voluntary open enrollment plan, transportation for special programs such as the cultural arts center, changing subdistrict boundaries to reduce racial concentrations and assist in neighborhood stabilization, innovative compensatory educational programs, and new teaching methods.

The Board of Education received the report without approving it in October, 1968. It adopted the Voluntary Open Enrollment Plan in November to go into operation at the second semester in January of 1969. It then turned its attention to changing boundaries of schools in northeast Denver in an attempt to balance and stabilize the racial and ethnic composition of student populations.

Smiley Junior High School was then 71.6% Negro, overcrowded, and there was concern about fights and other disruptions in the school. East High School was then 39.6% Negro and changing rapidly. Barrett Elementary School, as well as several other elementary schools in the Smiley subdistrict, were predominantly Negro.

The Superintendent's staff, at the direction of the Board, prepared plans to stabilize these schools, which involved detaching predominantly Negro school attendance areas and assigning them to other predominantly white schools in the south-central and southeast part of the city, and re-routing a number of elementary and junior high pupils from Lowry Air Force base who were already being transported, to the predominantly Negro schools. This system of satellite zoning, coupled with the District's policy of transporting children living beyond 1½ miles from their assigned elementary school and 2 miles from their assigned junior high school, would have resulted in additional transportation of some three thousand pupils.

Three resolutions, later numbered 1520, 1524, and 1531, were prepared to implement these plans. There followed, in early 1969, a

number of heated public hearings on the proposed boundary changes. They were televised and the entire community was informed and aroused. The terms of two of the five Board members who had voted for the Noel Resolution were to expire in May, and the five member majority pushed very hard for action. The last of the three resolutions was passed in April of 1969, and all were to take effect in September of 1969.

Both of the incumbent members ran for re-election in May, one as an independent. The other, teamed with another candidate, were known as pro-busing candidates. Two others ran as a team and were known as anti-busing candidates. The anti-busing candidates won handily on a city-wide basis.

The Board majority was thus changed. At a meeting on June 6, 1969, the new majority rescinded the three resolutions by a vote of 4 to 3. The majority then passed a new resolution numbered 1533, which contained all the provisions of the three rescinded resolutions, including implementation of two of the proposed elementary school complexes, transporting Negro pupils out of northeast Denver schools to relieve overcrowding, and a beefed up voluntary open enrollment plan, but it did not contain the boundary changes. The Board left Policy 5100, the Noel Resolution, and the Superintendent's plan intact, but placed emphasis on voluntary transfers to improve integration.

We had been expecting some kind of legal action since the early 1960's because of the various threats by groups on both sides of the issue of school integration. As a result of the 1964 boundary changes, one white parent brought suit in state court alleging that the Board members and the Superintendent had violated their oaths of office as well as the Colorado Constitution by considering race in changing the boundaries. The complaint was dismissed at the motion stage on technical grounds, and the case was dropped.

During the time of the hearings on the three resolutions, there were rumblings of a legal action to enjoin implementation of the resolutions on the grounds that they discriminated against white children because of their race. At the same time, word reached us that a committee of some thirty Denver lawyers were working and would commence a legal action if the resolutions were not passed. Although they must have anticipated it, they apparently were surprised by the action of the new Board in rescinding the resolutions. They did not react quickly enough to attempt to en-

join the rescission before it took place, but they did adapt their action to this changed circumstance.

Some might think that our legal position would be inconsistent in the face of such an abrupt change in the policy of the Board, but we had no trouble with that. Our position was, and is, that the Board had the power and discretion to change school zoning in the interest of improving education, and that the wisdom of its educational policy was not subject to review by the courts so long as it did not infringe on the Constitutional rights of the persons that it affected and, absent such a finding, no court had jurisdiction to interfere in the local government of the school district to the extent of second-guessing the Board on matters of educational policy.

I was pleased to learn that the Solicitor General of the United States agrees with this position. In the recent arguments in the *Charlotte-Mecklenburg* cases, he responded to Mr. Justice White's question as follows:

> MR. JUSTICE WHITE: "What of a system where there was no dual system in the past or government action? Is it true that the school board, to achieve certain goals, could redraw lines of attendance even if the lines take race into consideration?"
>
> THE SOLICITOR GENERAL: "Yes it could. But absent past discrimination the Constitution does not require it."

Since my senior partner had been the attorney for the School District since 1932, and had been privy to almost every informal conference of the Board, and had discussed boundary changes, building locations and school assignment policies with the Superintendents and staff, we knew that there was never any intentional discrimination on the basis of race. Since the early 1960's, I had been privy to many of these decisions myself. One thing did worry me, and I expressed it to the Superintendent and his two staff members. That was a "ratchet" effect of any decision by the Board which would tend to reduce *de facto* segregation. In other words, I was concerned that any reversal of such action would, in itself, be circumstantial evidence of an intent to discriminate. I feared that the old Board was pushing change so far that it could not later be undone, and I believe that at least one of its majority members was operating on this premise. The one factor here that could take the situation out of the irreversible ratchet effect was the fact that the resolutions were rescinded shortly after they were passed, very little planning had been done, and it was still three months before they were to become operative in the schools.

IV. The Lawsuit

On June 19, ten days after the rescission action, a complaint was filed in United States District Court in behalf of eight parents and their minor school children, who alleged that they represented all school children attending segregated or substantially segregated schools. Five of the plaintiffs were Negro, one Hispano and the other two were denominated "Anglo."

The complaint contained two causes of action, the first contained six counts and the second contained four courts. The first cause of action dealt with what we will call "resolution schools"—those in northeast Denver affected by the three resolutions. The prayer was for reinstatement and enforcement of the resolutions by injunction. The second cause of action alleged *de jure* segregation of the predominantly minority schools in the central area of Denver, and prayed for an order to desegregate them.

The complaint was accompanied by a motion for temporary restraining order to prevent cancellation of a purchase order for twenty-seven new school buses and destruction of documents and class programs then in existence and designed to implement the three resolutions in September. There was also a motion for a preliminary injunction.

Two Denver lawyers signed the complaint, three other lawyers from the NAACP in New York were listed as attorneys for the plaintiffs, and nine other Denver lawyers were listed as "of counsel."

We were short-handed in our office because our senior partner was on extended sick leave, and the next senior man was out of the city. We immediately attempted to retain trial counsel to help us with the hearing on motion for preliminary injunction, but none was available.

We spent several days preparing for a hearing on the temporary restraining order, but that hearing was not held. The plaintiffs then took the deposition of the Superintendent, which lasted two days. Then there were motions for production of documents and to inspect the voluminous files of the School District, which were tremendously time consuming. On the Saturday before the hearing was to begin, on Wednesday, July 16, we were served with 75 prepared exhibits and a list of 16 witnesses. At 9:00 the night before the hearing commenced, we were served with another 45 prepared exhibits and a supplemental list of three more witnesses. On

the morning of the hearing, we were served with the answers of the three minority members of the Board of Education, who appeared in their individual capacities *pro se,* and confessed judgment.

The exhibits included the three resolutions, the reports of the study committees, the Superintendent's plan and other voluminous documents from the files of the School District, plus a large number of maps and overlays, statistical charts and diagrams, all prepared by a statistician from the University of Denver and a medical doctor who had a personal interest in the case. They obviously had been preparing for months.

The plaintiffs limited the scope of the hearing to two counts of their first cause of action, that is, the cause of action relating to the resolution schools. Their first theory, based on *Brown v. Board of Education,* was that since 1960, the defendants had intentionally segregated the plaintiffs on the basis of their race. The second theory was that while the defendants had no duty to integrate, they had a duty to refrain from taking action which would intensify segregation, regardless of motive or intent. The first theory was directed to the location of Barrett School and the minor boundary changes in northeast Denver elementary schools in 1962 and 1964. The second theory was pointed to the rescission of the three integrative resolutions. This was the "ratchet" that we feared, although it was never presented or argued as such, and throughout the hearing the facts were blurred to give the impression that the resolutions had actually gone into effect. Statistical charts and tables showed racial percentages in the schools as if the resolutions had been implemented and the effect of the rescission was to resegregate the children by placing them back in their former schools. This was simply not the fact. The resolutions had been rescinded three months before any children were to have changed schools.

Part of the evidence consisted of testimony of one of the Board members defeated in the May election, and two of the Board members who confessed judgment. They testified that the Board had intended the resolutions as an attempt to stabilize the racial composition of the schools and maintain a racial balance in the schools of the area which more nearly approximated city-wide averages. Much of the statistical data presented was an attempt to show variance from city-wide averages, or, in other words, racial imbalance. An exhibit prepared by the statistician purported to show a segregation index. On this index, perfect racial balance

was the optimum and deviations from that optimum were shown on the graph. Thus, a 100% white school would show up on the index as a segregated school. Other exhibits were interpolations of census data designed to establish the racial composition of schools where such information was unavailable from school sources.

The hearing went on for five days and 757 pages of transcript. The background of the construction of Barrett School, the minor boundary changes in northeast Denver, the use of mobile classroom units in those schools as a temporary means of accommodating the growing numbers of pupils, and assignment policies of teachers were all thoroughly discussed by witnesses for both sides. Dr. Dan Dodson, a professor of education from N.Y.U., who had prepared the Dodson report which became a factor in the New Rochelle case was called as an expert witness. A significant thing about his testimony was the distinction between integration and desegregation. He defined integration as psychological acceptance of people so that race and creed or such things don't make any difference. He defined desegregation as the forced mile required by the law.

The plaintiffs argued that their evidence proved an intent to segregate because of the absence of any attempt to justify the construction of Barrett School and the elementary school boundary changes on educational grounds, and further, that the rescission of the resolutions was unconstitutional because they were a gerrymander—the ultimate gerrymander—in effect re-drawing the boundaries as they had existed prior to the passage of the resolutions.

We argued that the Board had pursued a color-blind policy of school zoning until the report of the Special Study Committee was received in 1964, and that it made these decisions based on racially neutral factors such as geography and numbers of pupils. In fact, the Board had no racial data available to it at the time the decisions were made. As to the rescissions, we argued that there was no irreparable harm sufficient to support an injunction, in fact, no harm at all, since the resolutions had never been placed into effect. Indeed, the replacement plan, Resolution 1533, had a beneficial effect when compared to what was available the previous fall, because it offered the voluntary open enrollment plan with transportation provided. We argued that the office of a preliminary injunction was to preserve the status quo, and that the plaintiffs were asking for a mandatory injunction to reinstate the resolutions, the ultimate relief sought in their complaint. Further,

since their theory was that a board had a duty to prevent *de facto* segregation and this was admittedly a novel theory, they had shown no probability of success on the merits, because, having relied on a novel theory, there was no law to support them.

The judge perked up his ears at our suggestion that the plaintiffs wanted a mandatory injunction. I had the feeling throughout the hearing that we were not getting through to him, yet I really couldn't bring myself to believe that their evidence really proved anything which could rise to the level of a violation of the Fourteenth Amendment. He actively participates in his trials, and he was most active in this one, but even when some of his remarks and questions indicated that he was leaning toward the plaintiffs, I really didn't believe that they had a case, even giving them the benefit of every bit of controverted evidence. Then at the end of my argument, I began to have some hope that he would deny the preliminary injunction and we would get the time that I knew we needed to put on an affirmative case that would put the facts in the proper perspective, and the time we needed to prepare more lucid briefs on the law.

He then asked the plaintiffs' counsel:

> "Then what you want is really a mandatory injunction requiring them to carry out 1520, 1524, and 1531?
> MR. GREINER: "I believe that is correct, Your Honor."
> THE COURT: "I haven't got the power to do that."
> MR. GREINER: "Oh, sure, you do."
> THE COURT: "No, I don't . . . "
> THE COURT: "The only thing I can say to you, Mr. Greiner, is that if what you request is granted, the law suit is all over. No point in having a hearing next fall or any other time. You will have prevailed, and there is nothing else to try because I will have found all the disputed facts and all the disputed law in your favor. That's what you want, I am sure."

Well, he took the case under advisement, and I am sure that he didn't sleep much that night.

The next morning, the news had banner headlines to the effect that Judge states he has no power to grant mandatory injunction. Our hopes were short-lived. The Judge called us in that day, July 23rd, and announced his ruling from the bench. He had, indeed, resolved all disputed facts and law in favor of the plaintiffs and had granted the mandatory injunction. I asked for a stay and was granted ten days.

From there, we were off to the races. The Court filed his written opinion on August 1, (303 F. Supp. 279). We filed our notice

of appeal and filed our motion for stay pending appeal in the Tenth Circuit Court of Appeals. It was set for argument on August 5, and the Court required simultaneous briefs. The motion for stay was argued the morning of August 5. After noon, the Court of Appeals called and wanted to hear more argument on the effect of Section 407(a) of the 1964 Civil Rights Act. The Court had correctly interpreted the three resolutions as racial balancing measures by the School Board and questioned the enforcement of them by the District Court. Finding that the District Court had not considered the Act, the Court of Appeals, in an order issued that day, remanded the case for consideration of the effect of the Act.

The next day, we were back in the District Court arguing Section 407(a). Briefs were filed, and the District Court issued its supplemental findings and opinion on August 14, (303 F. Supp. 289), holding Section 407(a) inapplicable because it had found *de jure* segregation, but it did eliminate the senior high schools from the operation of the injunction since East High could not have been segregated because it had less than 50% Negro students.

After another all-night session and another brief, we again argued in the Court of Appeals on August 22.

At 5:00 P.M. on Wednesday, August 27, the week before school opened, the Court of Appeals released its opinion granting our stay. At 8:00 P.M. the same evening, we were served with a motion in the Supreme Court of the United States to vacate the stay and reinstate the preliminary injunction. It was addressed to the Honorable Byron R. White, Circuit Justice for the Tenth Circuit. We had expected this to happen, and I had talked with the Deputy Clerk earlier that day. He advised that if we wanted to oppose such a motion, we must have a written response filed by 2:00 P.M. the next day in Washington, and that it had to be hand carried.

After another all night session, we were on a plane at 6:00 the next morning and preparing oral argument. We filed our written response by 2:00 P.M. The case was assigned to Justice Brennan because Justice White was in Colorado on vacation. We were told that we would be called if the Justice wanted to hear oral argument. At 4:00 P.M., the Clerk called to say that Justice Brennan did not want to hear oral argument and that he was writing something which would be announced at 10:00 the next morning, Friday, August 29. I knew then he would grant the motion because the Supreme Court Rules provide that a denial is accom-

plished by simple endorsement on the motion and it may then be presented to another Justice. At 10:00 the next morning, we were handed copies of a three page, printed opinion, granting the motion and reinstating the judgment. This opinion is reported at 24 L.Ed. 2d 37. That same evening, we were on a plane headed back to Denver.

We arrived at about 8:30 P.M., went to the office where four of our men were working on a new motion asking the Court of Appeals to amend its order of August 27, by correcting the deficiency noted by Justice Brennan, namely that the Court of Appeals had not specifically found that the District Court had abused its discretion. The motion was filed, but time had run out. School started the next Tuesday, and the resolutions were made operative as to the elementary and junior high schools affected. Nevertheless, the motion was briefed and argued, and the Court of Appeals filed its opinion on September 15th. It was rather strongly worded —"The record before us at the time of our order showed that Colorado has not, and never has had, any state imposed school or residential segregation. No discrimination in school transfers was either shown or claimed. No gerrymandering was shown or claimed. The district court's findings of *de jure* segregation, or a dual system, were confined to a small number of schools and were based on the failure or refusal of the School Board to anticipate population migration and to adjust school attendance districts to alleviate the imbalance resulting from such population shifts"— but the opinion concluded that the public interest would be best served by denying the motion in view of the change in the status quo and holding the appeal in abeyance until after a trial on the merits.

As a sidelight, two of the three judges on that panel have since retired, and the third is deceased. As another sidelight, the District Judge who tried our case has been proposed to fill one of the vacancies on the Court of Appeals.

The rest of the year, the case went like this:

September 26: Secured services of well-known Denver trial attorney as special trial counsel.

October 6: Answer filed.

October 16: Plaintiffs' first motion for production of documents served. Calls for estimated 8,000,000 to 11,000,000 raw test scores of pupils among other items.

October 17: Received Plaintiffs' first set of interrogatories—300 questions requiring 90,000 separate answers.

October 20: Motion to intervene, answer and cross claim of intervenors.
October 21: Trial of long hair case—same District Judge.
October 28: Plaintiffs' second motion for production of documents.
October 29: Plaintiffs' second set of Interrogatories.
November 13: Pretrial set November 25, trial set for January 5, 1970.
November 14: Teachers' strike.
November 18: State court action for temporary restraining order against picketing.
November 25: Pretrial conference.
November 26: Strike settled.
December 8-December 29: Preparation of exhibits and interview witnesses: Plaintiffs' exhibits total 344, Intervenors' 19, and Defendants' 99.
December 29: Hearing on objections to class action.
January 1, 1970: Special trial counsel dies of coronary.
January 6: Secured services of a well-known Denver trial attorney as new special trial counsel and obtained a continuance of the trial to February 2.
February 2: Trial on merits—the Court ruled that no evidence introduced at preliminary hearing need be presented again at trial.
February 5: Denver Public Schools school bus parking lot hit by bombs; 23 school buses and 3 trucks destroyed; 21 school buses and six trucks damaged.

The trial proper lasted fourteen days, and produced some 2,250 pages of transcript. The plaintiffs' case was focused on their second cause of action relating to the schools in the central area of Denver which do contain high percentages of minorities. Under their first theory, they concentrated on alleged gerrymandering of boundary lines and location of new buildings in an attempt to show the same kind of *de jure* segregation as they had done so successfully at the preliminary hearing.

Their second theory was that the concentrations of minorities in the schools of the area produced unequal academic achievement, and even if the school district was not responsible for the concentrations, it was, on pure equal protection grounds, obligated to correct the unequal educational output by changing the peer group if necessary just as in the pre-Brown cases following *Plessy v. Ferguson,* boards of education were required to provide equal facilities.

Our case was rebuttal of alleged gerrymandering in the core city schools, and directed to rebutting the findings of the Court at the preliminary hearing with reference to Barrett School and the elementary school boundary changes in Northeast Denver. There was direct testimony of the Superintendent, Principals and Board members, that there was no intent to discriminate and decisions

were made objectively on the basis of accommodating numbers and in the best interests of all children.

The case was thoroughly briefed and argued, and a written opinion was handed down on March 21, 1970, and is reported at 313 F. Supp. 61. The prediction made by the Court at the close of the preliminary hearing held true. He reaffirmed all of his findings from the preliminary hearing, and added in East High School and Cole Junior High School to fully effect the prior resolutions. In so doing, he relied heavily on the California proposition 14 case of *Reitman v. Mulkey*, 387 U.S. 369, decided in 1967, and analogized the passage of the Constitutional amendment, proposition 14, which effectively repealed a California fair housing law to the rescission of the three Board resolutions. We don't think the analogy is apt.

As to the second cause of action, the Court rejected the claim that the core city schools were *de jure* segregated, and found them to be *de facto* segregated. He found a lack of causation linking the alleged discriminatory acts to the end result. We might add here that he could have reached the same result as to the northeast Denver schools, had he applied the same reasoning.

The Court also rejected the contention that the neighborhood school policy was unconstitutional because it produced segregation in fact, citing decisions of the Tenth Circuit Court of Appeals.

The Court then turned to plaintiffs' equal protection theory and bought it, lock, stock, and barrel. He found a correlation between low achieving schools and race when the concentration of Negro or Hispano students reached 70-75%, but he refused to lump minorities together to get this result as the plaintiffs had urged. As a result, he found 14 elementary schools, two junior high schools, and one senior high school, which fit his criteria. The finding of unequal achievement and its correlation with racial isolation was the major factor. He stated that under the old *Plessy* rule, school boards were not required to abandon dual systems, but were required to provide equal facilities, and today, school boards are not required to integrate *de facto* segregated schools, but are charged with the duty under the Fourteenth Amendment, of insuring an equal educational opportunity.

It strikes me that you do not measure "opportunity" by an output test such as the average achievement in a school. Opportunity does not mean guaranteed result. To me, it means equal input or even unequal input depending on the need. Individual achieve-

ment scores in the predominantly minority schools ranged as high as the 99th pencentile. This indicated to me that there were adequate inputs.

In any event, if this case goes down in history for anything, I'm quite certain that it will be for this equal protection innovation.

Having gotten that far, the Court was then concerned about the remedy, and we had a four day hearing and another 669 pages of transcript on remedies, commencing May 11, 1970. The Court heard the plaintiffs' experts, among them, Dr. James Coleman, author of the Coleman Report, and Dr. Neil Sullivan, the architect of the Berkeley, California integration plan. Our experts were the Superintendent, and the principals of predominantly minority Manual High School, Cole Junior High School and Bryant-Webster Elementary School.

Plaintiffs' plans were two computer programs—one for pairing the 14 elementary schools with "anglo" schools. That plan involved 31 schools and required the transportation of 11,109 students. The other plan was simply a numbers scramble to achieve a racial balance. It involved 29 schools and the cross-transportation of 8,380 students. Both of the plans meticulously balanced average achievement scores so that the product was racial balance and equal achievement. I couldn't help thinking that somehow the interest of the child got lost in the shuffle. The Constitution was satisfied by their mechanical arrangements, but the under-achiever didn't improve one bit. It reminded me of a quote from Mark Twain—"there are three kinds of liars—plain liars, damned liars and statisticians."

During Dr. Coleman's testimony, the Court became disturbed about his thesis that the composition of the peer group had the greatest influence on the academic achievement of a child.

> THE COURT: The thing that worries me about all this is that what you say is that the schools are not inferior as counsel proved at the trial, but that the students are inferior. They proved it overhelmingly that the schools were inferior; their offerings were inferior. Now, in coming up with a new tack—it's not the schools at all, it's the students and their economic and cultural deprivation that makes the educational experience one that is noncompetitive. It's dull; not exciting. I mean, I get that from what you're saying. Sort of a self-defeating proposition. They proved the constitution was violated and now they are unproving it.
>
> THE WITNESS: I'm really trying to say the following that is, that first of all that, of the school resources which are provided by the school system, those which show more relation to a child's achievement are the characteristics of the teachers, in particular the verbal skills of the

teachers. But that these are not as important for the achievement of the particular student in terms of our analysis as the social composition of the rest of the student body. Secondly, that with regard to compensatory programs, if one evaluates these programs simply in terms of the increase in performance that occurs as a consequence of them or that occurs for children who have participated in them, there is very little cause for optimism with regard to the overall effectiveness of these programs. But, of the things which the school board provides, the characteristics of teachers and in particular the verbal skills of teachers seem to be the most important characteristics.

THE COURT: We will take a short recess.

Dr. Sullivan testified that all his experience had been with voluntary integration plans and that it required at least two years to accomplish the planning and create an atmosphere of community acceptance.

The Defendants' proposed plan included a great number of innovative and beefed up compensatory education programs and a space guaranteed voluntary transfer plan for pupils in the 17 court designated schools.

The Court issued its Decision re Plan or Remedy on May 21, 1970, reported at 313 F. Supp. 90. In that opinion, he reviewed the evidence and observed that there were novel questions of law involved, one of which was whether compensatory education coupled with a voluntary transfer policy would satisfy the requirements of the constitution. He answered the question this way:

"We have concluded after hearing the evidence that the only feasible and constitutionally acceptable program—the only program which furnishes anything approaching substantial equality—is a system of desegregation and integration which provides compensatory education in an integrated environment."

The Court then went on to direct the remedy which included the maintenance of a voluntary open enrollment plan as an interim measure, the desegregation of one-half of the 14 elementary schools by the fall of 1971 and the other half by the fall of 1972, and the compensatory education programs proposed by the Board. Special treatment was given to the junior and senior high schools.

With reference to the details of the plan, the opinion provided:

"Because the plaintiffs and the School District have the expertise necessary for devising a system of school redistricting and transportation to achieve the result set forth above, we leave these details to them. But we stress that the details of the scheme must be carefully examined and checked, having in mind that the program is a human one. While the computers can be useful in such an effort, their results must be checked with care to prevent unnecessary burden to the persons involved. The

final details will be subject to review by the Court. We have, of course, been reluctant to decree mandatory transportation, and it should be avoided to the extent possible."

We are now in that planning stage.

A final decree and judgment was entered on June 11, 1970, almost a year after the complaint was filed. Our Notice of Appeal was filed on June 16, 1970, and the Plaintiffs' Notice of Cross Appeal was filed on June 24, 1970. We again filed a motion for stay pending appeal, which was denied on July 28, 1970. The matter was accelerated, simultaneous briefs were filed on August 11, reply briefs were filed on August 17, and the matter was fully argued on August 18, 1970.

It was our general impression that the Court of Appeals intended to decide the case on the merits prior to the opening of school, but as yet, we have no decision. We suspect that the Supreme Court's action in setting the *Charlotte-Macklenburg* cases for argument on October 12, 1970, has caused the delay and we do not expect a decision from the Tenth Circuit Court of Appeals until after the decision of the Supreme Court in the *Charlotte-Mecklenburg* cases.

Shortly after our notice of appeal was filed, the plaintiffs filed a motion for leave to amend their complaint to add a claim for attorneys' fees. No action will be taken on that motion until the appeal process is completed.

V. Conclusion

If any observations are in order, all of us would probably agree that this whole process is a very poor way to go about making needed changes in our system of public education. In closing argument at the preliminary hearing, we quoted from the Second Circuit Opinion in *Taylor v. Board of Education of New Rochelle:*

"Litigation is an unsatisfactory way to resolve issues such as have been presented here. It is costly, time consuming—causing further delays in the implementation of constitutional rights—and further inflames the emotions of the parties."

Admittedly, public school systems seem unable to provide stimulating and relevant programs for students. This is true regardless of the race or social class of the student, but the impact may be greater on the children from lower socio-economic classes where education is relied upon more heavily as the ladder of upward social mobility.

Reasons for this failure are not entirely clear, but it is clear that a new definition of the objectives of public education is needed. Identification of priorities is needed and new approaches are needed. This is the duty of professional educators, not the courts, but if educators default, they are sure to be on the receiving end of more cases like this one. I believe that in our order of government, it is not the responsibility of the courts to intervene, but history tells us that if one agency continues to default, some other agency will intervene.

While I disagree with the legal conclusions of the District Judge in our case, I can understand his sensitivity to the underlying problem. Our judges see the products of our imperfect educational systems before them almost every day—the social misfits and dropouts who come before them accused of all kinds of anti-social behavior. Many of them cannot even express themselves. How can we expect them to compete in our dominant middle class society? They are not equipped. We have failed them, and in the process we have contributed to a good many of our current social problems. It is only natural that when the opportunity to do something about this underlying problem appears before them, judges feel compelled to do something, knowing that the solutions they suggest are not ideal, but hoping educators will take the ball from there.

DISPARITIES IN EDUCATIONAL RESOURCES AND OUTCOMES, AND THE LIMITS OF THE LAW

By Mark G. Yudof*

I. Introduction

It is typically American that the most significant modern attempt at racial equality, *Brown v. Board of Education,* involved the schools. Americans believe that education, when offered to everyone on an "equitable" basis, will permit the economically and culturally deprived to improve their lot and to take their fair share of society's status and income rewards. Fundamental political, social, and economic change are conceived of in educational terms; education—that is, schooling—will resolve conflicts, change attitudes, and diminish inequities. Professor Cremin stated the point succinctly when he noted that "in other countries, when there is a profound social problem there is an uprising; in the United States, we organize a course!"[1] There is general agreement that equal educational opportunity is a goal worthy of achievement. There has been far less than a consensus as to how that concept should be defined and implemented. Many argue that equal educational opportunity means that each child must have equal access to schooling resources. Equal dollars or equal facilities and services must be provided to each pupil. Some have urged that racially segregated schools deprive minority students of an equal educational opportunity. Others have taken a broader perspective and argued that equal educational opportunity must be defined in terms of the *effectiveness* of the resources and process. Thus, equal educational opportunity would mean that each child should fulfill his full potential, or develop to a minimum sufficient to function adequately in a modern world. In the words of John Gardner, the goal of education "is to enable every youngster to fulfill his potentialities, regardless of his race, creed, social standing or economic position."[2]

The first definition of equal educational opportunity relies on a basically moral and political argument: it is fundamentally unfair for the state to discriminate in the provision of educational services between children of different races and socio-economic groups—regardless of the lack of empirical proof that the dis-

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*Lecturer, Harvard Graduate School of Education.

[1]Cremin, *The Genius of American Education* 11 (1965).

[2]Wise, "The Constitution and Equal Educational Opportunity," in Daly (ed.), *The Quality of Inequality: Urban and Suburban Public Schools* 42 (1968).

crimination injures those children in terms of schooling outcomes or life prospects.[3] The state may not spend three times as much money on one child as on another—merely because the latter is poor and lives in an inner city. Similarly, the state may not create segregated schools for black youngsters. Apartheid is morally abhorrent, it is a badge of slavery and inferiority, it is an invidious classification and it denies black children the equal protection of the laws.[4]

The third definition of equal educational opportunity, which looks to schooling outcomes, assumes that there may be wide disparities in the allocation of educational resources. These disparities may be acceptable if the differential needs of children are being met such that there is an equality in the effects of the schooling process.[5] According to this view, resources are to be valued only as ways of achieving specified goals. Constitutional unfairness resides in the fact that educational failure—poor achievement and lack of access to further schooling—is not randomly distributed, but directly related to race and socio-economic deprivation.[6]

As a matter of policy, an outcomes definition of equal education opportunity is probably the more sensible. Our concern is not with shiny new buildings or books or fancy equipment; our concern is with the results those things achieve. We want poor and black children to perform well in school. Yet, as a lawyer, I must ask whether a concept of equal educational opportunity which focuses on schooling outcomes is appropriate for judicial consideration and enforcement. Reluctantly, I have reached the conclusion that it is not. My thesis is that the judiciary may appropriately intervene in the educational process to do two things: to redress discrimination, and to equalize the distribution of educational resources and services. Courts, however, should not adjudicate rights when cast in terms of schooling outcomes. This thesis derives both from considerations of the traditional role of courts in equal protection cases and from an examination of the social science literature dealing with educational achievement.

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[3]See Coons, Clune, and Sugarman, *Private Wealth and Public Education (1970)*. Compare Cahn, "Jurisprudence," 30 *N.Y.U. L.* Rev. 150 (1955).

[4]*United States v. Jefferson County Board of Education*, 372 F. 2d 836 (5 Cir. 1966), aff'd en banc, 380 F. 2d 385 (5 Cir. 1967), cert. denied 389 U.S. 840 (1967); *Brunson v. Board of Trustees of School District No. 1 of Clarendon County, South Carolina* (4th Cir., No. 14, 571, June 5, 1970) (Sobeloff, concurring).

[5]Kirp, "The Poor, the Schools, and Equal Protection," 38 *Harv. Ed. Rev.* 635 (1968). See also Benson, *The Economics of Public Education* (1968).

[6]See Wise, *supra*; Comment, "Equality of Educational Opportunity: Are 'Compensatory Programs' Constitutionally Required?", 42 *So. Cal. L. Rev.* 146 (1969).

II. The Judicial Role

There are clear constraints on the courts' ability to promote social reform. Apart from considerations of judicial craftsmanship, and the need for principaled decisions—in Professor Wechsler's terms, "reasons that in their generality and their neutrality transcend an immediate result"[7]—the courts are institutionally incapable of performing a fullfledged legislative role. Court decisions, historically, have been anti-majoritarian—they have tended to protect minorities at the expense of the majority. Application of this understanding of the courts' role to education suggest that school policies may be overturned by the courts if those policies violate the fundamental constitutional rights of poor or minority children. However, courts will be reluctant to substitute their own wisdom for that of elected officials absent compelling reasons. Such compulsion is usually present only where the injured class—in this case poor and black children and their parents—are unrepresented or substantially under-represented in the political processes.[8]

Furthermore, courts cannot make factual determinations as readily as legislatures and administrative agencies. A legislature or school administration can hire a staff, hold extended hearings, commission a lengthy study and examine in detail every aspect of a complex problem—giving all the conflicting interests an opportunity to be heard. A court, on the other hand, is limited to the case before it, it does not have a huge staff, it does not have the expertise, and in general its processes are ill-suited to unravelling complicated facts for the purpose of setting broad policy. Furthermore, administrators and legislators, at least theoretically, are free to alter decisions as new information reveals their inappropriateness. Courts are not afforded this luxury. A constitutional decision, once reached, is not likely to be overturned quickly.[9] In light of this danger, the court in *McInnis v. Shapiro,* a suit concerning the allocation of educational resources, was unmistakably correct in holding that ". . . the courts simply cannot provide the empirical research and consultation necessary for intelligent educational planning."[10]

Under these circumstances, Professor Kurland has suggested

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[7]Wechsler, "Toward Neutral Principles of Constitutional Law," 73 *Harv. L. Rev.* 1 (1959). See also Black, "The Lawfulness of the Segregation Decisions," 69 *Yale L.J.* 421 (1960).

[8]See Coons, *supra.*

[9]See *Plessy v. Ferguson,* 163 U.S. 537 (1898).

[10]*McInnis v. Shapiro,* 293 F. Supp. 327 (N.D. of Ill. 1968).

that a fundamental decision based on the equal protection clause will be effective only if it meets at least two of three basic criteria.[11] First, the constitutional standard must be simple. The complexities of the situation must not be so great that the Supreme Court is unable to formulate an intelligible rule which can be communicated to the parties and to the lower courts. Second, the courts must have the ability to enforce their decisions effectively. If a particular result is constitutionally required, the courts must be able to apply their power to something that is amenable to the application of power. They must be able to affect men, resources, and policies in a manner calculated to achieve their ends. Third, there must be "public acquiescence—there is no need for agreement, simply the absence of opposition—in the principle and its application."[12]

Given this sense of the constraints on the judicial role, let me set out my contentions more specifically. I believe that it is inappropriate for the courts to intervene in the educational process so as to bring about some equity in the distribution of schooling outcomes because the issues are so complex and the state of our knowledge so backward, that the courts presently cannot create or enforce simple rules which will achieve that purpose.

The courts are a proper forum for the adjudication of the moral, political, and constitutional issues raised by inequities in resources and by racial discrimination. In these cases, the problem is one of counting or measuring what goes into the process. Furthermore, the courts are a proper forum for helping to create a non-coercive school environment, and for guaranteeing personal liberties to juveniles. Again, the concern is with how children are treated per se, and not with the effects of that treatment on educational achievement. In dealing with the empirical vagaries of outcome equalization, however, courts are fundamentally unsuited to bring about reform. Tidbits of social science research are not the stuff of which inflexible constitutional standards can be made.[13]

III. Equal Educational Opportunity and Outcome Equity.

Thus far, an outcome model of equal educational opportunity remains ill-defined. Do we mean that each child, regardless of

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[11]Kurland, "Equal Educational Opportunity or The Limits of Constitutional Jurisprudence Undefined," in Daly (ed.), *The Quality of Inequality: Urban and Suburban Public Schools* 58 (1968).

[12]*Ibid.*

[13]Compare Cahn, "Jurisprudence," 30 *N.Y.U. L. Rev.* 150 (1955); Black, "The Lawfulness of the Segregation Decisions," 69 *Yale L.J.* 421 (1960).

his background should reach the same level of achievement? Or do we mean that each child should be able to reach his full potential—thereby preserving a large degree of disparity in the effects of schooling? How do we measure potential? Potential for what? Given limited resources, to what extent should we concentrate on raising the underachieving child up to the norm? Or should we focus on the so-called gifted child? How do we measure achievement? Are we concerned only with test scores? With inculcating a sense of personal self-worth and fulfillment? With life prospects as measured by status and income? Answering these questions is extraordinarily difficult. Unfortunately, in large part, they have not been asked by those concerned with equal educational opportunity. Rather, there has emerged what can be called the "liberal model" for educational reform. This model is the culmination of the efforts of liberal reformers to substitute the American democratic ideal and a faith in technocratic expertise for a clear understanding of this complex issue.

The liberal model views schooling as a process designed to sever what is deemed to be an illegitimate relationship between family background—race and class—and educational success.[14] The model assumes that the capacity to learn is randomly distributed between races and socio-economic groups. Thus, a properly functioning educational system is one in which failure and success are randomly distributed and cannot be correlated with race, social class, or wealth. In this respect, it is improtant to note that an educational system which treated all students shabbily would satisfy the "liberal model." "The target evil" is the discrimination and not the deprivation of an essential right.

The possibility of such an ironic result to reform efforts has led Professor Michelman of the Harvard Law School to argue that the "'equality' explosion of recent times has largely been ignited by reawakened sensitivity, not to equality, but to a quite different sort of value . . . which might be called 'minimum welfare.'"[15] The liberal model then, seeks not so much to eliminate educational failure, as to eliminate discrimination in the distribution of such failure.

The liberal model further assumes that there is a single definition of educational success which we all accept. Test scores measure educational performance, high test scores allow access to ad-

[14]See Wise, *supra.*
[15]Michelman, "The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment," 83 *Harv. L. Rev.* 7 (1969).

ditional years of schooling, and both are prerequisites to the good life—that is, status and income. In the words of one commentator, "the value of education is seen as instrumental, leading to ends extrinsic from the processes of formal instruction itself. We get an education *now* so that at some *later* time we can earn money, vote intelligently, raise children, serve our country and the like."[16] Disregarding arguments as to whether commonly employed tests are culturally biased, and as to whether school performance is, in fact, a good indicator of life performance,[17] the liberal model rejects a healthy pluralism of educational ends in favor of a single monolithic goal—improved achievement as measured by tests. Education may have many purposes—to instill a sense of community, to maximize individual liberty, to create self-respect, to inculcate a feeling of purpose and self-worth, and to begin a process of intellectual growth. The liberal model ignores these conflicting values.

The most significant premises of the liberal model, the premises ultimately affecting judicial intervention, are that our technology can identify what affects schooling outcomes, that there are experts who can and will perform this function, and that society has an unremitting obligation to heed the advice of these experts in defining Constitutional rights. That is, having decided that the properly working school system should eliminate differences in achievement arising from racial and socio-economic background factors, we assume that we know how to intervene in the schooling process so as to bring about that result.[18]

The fact is that we know very little about the relationship between particular resources and policies and educational outcomes, what economists call the education production function. Indeed, it is far from clear whether schools in any way reduce the effect of socio-economic factors on achievement. The Coleman Report noted that

> Whatever may be the combination of non-school factors—poverty, community attitudes, low educational level of parents—which put minority children at a disadvantage in verbal and nonverbal skills when they enter the first grade, the fact is the schools have not overcome it. . . . [19]

The Report went on to find that after controlling for six student

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[17]See, e.g., Gintis, *Alienation and Power: Toward a Radical Welfare Economics*, Ph.D. dissertation (Harvard, 1969); Hanock, "An Economic Analysis of Earnings and Schooling, 2 *Journal of Human Resources* 310 (1967).

[18]See, e.g. *McInnis v. Shapiro, supra.*

[19]*Equal Educational Opportunities Survey* (Herein-after the "Coleman Report").

socio-economic background factors, differences in resources and policies between schools accounted for less than 1% of the average pupil achievement differences. Further, Coleman discovered that within school variations in achievement were four times greater than between school variations.[20] These findings argue that family background has the most significant effect, that school policies and resources have a relatively slight impact, and that, despite our technological skills, children who attend the same school, have the same amounts of money spent on them, and who have similar family backgrounds achieve at fantastically different rates. All schools fail to educate many of their pupils, and this is as true in suburbia as it is in the inner city.

The only factor over which the school has some control and which shows a relatively consistent if not substantial relationship to achievement is the socio-economic composition of the student peer group. If a poor child comes from a background which is not supportive of education, and if he is placed in a school where his fellow students have strong educational backgrounds and aspirations, his school performance is likely to improve. In the application of this finding, it is not clear whether there is an independent effect of racial integration or whether "the academic benefits of racial integration . . . [are] a consequence of racial differentials in the distribution of social class."[21] Further, it is at least arguable that poor families which send their children to predominately white and middle class schools are themselves educationally conscious, and this consciousness, rather than the attitudes of fellow students may be the reason for improved performance.[22]

Once one looks beyond the composition of the student body, there is an array of tangible resources and policies which do not seem to affect relative performance.

1. According to the Coleman Report and its progeny, "facilities and curriculums of schools account for relatively little variation in pupil achievement as this is measured by standardized tests."[23]

2. Coleman found that the quality of teachers, as measured by verbal skill, level of education, and level of parents' education, showed a positive relationship to achievement.[24] Christopher Jencks—reanalyzing the same data—reached contrary results, and,

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[20] *Ibid.*

[21] Cohen, Riley, and Pettigrew, Unpublished Manuscript, Harvard University (1970).

[22] Jencks, Unpublished Manuscript, Harvard Center for Educational Policy Research (1970).

[23] *Coleman Report, supra;* Jencks, *supra.*

[24] *Coleman Report, supra.*

indeed, found that the proportion of tenured teachers negatively correlated with student success.[25]

3. Both Coleman and Jencks found no evidence that reductions in class size would improve the performance of disadvantaged children.[26]

4. Emlen Hall recently reviewed the literature on ability groupings, and reached the following conclusions:

> . . . the rationale for institution of plans, like ability grouping, relies heavily on the proposition that students in track systems increase their capacity to learn (and their educational achievement) as a consequence of the differentiated programs to which they are assigned . . . the problem posed: Do children grouped homogeneously achieve better over a given limited period of time—usually not more than two years—than children who are grouped heterogeneously, all other things being equal. Answer: usually not. Further, there is some evidence that while homogeneous grouping has no particular effect on children of high or middle ability, it measurably adds to the disadvantage of children of low ability.[27]

The evidence that I have just discussed is not without its critics. Bowles and Levin, for example, attacked the Coleman Report and its successors on methodological grounds. They concluded that ". . . both from the measure of variables and the statistical procedures used, the research design was overwhelmingly biased in a direction that would damper the importance of school characteristics."[28] They strongly urged that no policy conclusions can be drawn about the effectiveness of school resources until a more careful analysis of data had been performed.[29]

However, it is this very lack of conclusiveness with regard to what factors bear on educational success that makes inappropriate judicial intervention in the process in order to achieve the goals of the "liberal model." Whether recent empirical studies are right or wrong, it is clear that we are a long way from a complete understanding of the causes of variations in the quality of education.[30] There are simply no standards that the courts or any other institution could formulate presently which would assure improvement in the schooling outcomes of the disadvantaged. Even

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[25]Jencks, Unpublished Manuscript, Harvard Center for Educational Policy Research (1970).

[26]*Coleman Report, supra;* Jencks, *supra.*

[27]Hall, "On The Road to Educational Failure: A Lawyer's Guide to Tracking" 5 *Inequality in Education* 2 (June, 1970).

[28]Bowles and Levin, "The Determinants of Scholastic Achievement - An Appraisal of Some Recent Evidence," 3 *Journal of Human Resources* 8 (1967). Compare Jencks, "A Reappraisal of the Most Controversial Educational Document of Our Times," *New York Times Magazine* (Aug. 10, 1969).

[29]*Ibid.*

[30]Burkhead, *Public School Finance: Economics and Politics* 87.

assuming the creation of a standard, there is no way to enforce such a broad equal protection decision because the courts, like educators, do not have any notion as to how to manipulate resources and policies so as to achieve an equity in schooling outcomes. In sum, the acceptance of the ideology of the liberal model, and the assumption that a cogent constitutional argument can be made, do not make out a case for an affirmative judicial response. As the court in *McInnis v. Shapiro* concluded.

> Even if the Fourteenth Amendment required that expenditures be made only on the basis of pupils' educational needs, this controversy would be non-justifiable. While the complaint does not present a 'political question' in the traditional sense of the term, there are no 'discoverable and manageable standards' by which a court can determine when the Constitution is satisfied and when it is violated.[31]

IV. Equal Educational Opportunity and Race

Having attacked the notion that the judiciary is an appropriate institution for dealing with inequities in pupil achievement or outcome, let me now turn my attention to those areas of education where I think a judicial response is called for. These are two: racial discrimination and inequities in the distribution of resources.

Since *Brown v. Board of Education,* it has been a basic tenet of Constitutional law that schools deliberately segregated by race deprive minority children of an equal educational opportunity. As the *Brown* court declared "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive[s] the children of the minority group of equal educational opportunities."[32]

It is readily apparent that the *Brown* decision can be interpreted in a variety of ways. As Professor Kirp stated the point, "Was the Court [in *Brown*] implying that segregation was unconstitutional not only because it was morally abhorrent but also because it adversely affected chances for educational success?"[33] We may further ask: Was the Court primarily concerned with the differential resources made available to black and white schools? Was it treating students as a resource which must be equalized under the separate but equal standard? Or was the Supreme Court's response designed to ameliorate white dominance in the governance of public schools by attempting to mesh inextricably the edu-

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[31] 293 F. Supp. 327 (N.D. Ill. 1968).
[32] 347 U.S. 483 (1954).
[33] Kirp, *supra.*

cational fortunes of black and white children? Certainly, the Delphic text of the *Brown* opinion lends some support to all of these views.

The *Brown* decision makes sense in terms of public policy and judicial enforcement only if it is treated as a case premised upon the political and moral injury done by segregation.[34] Fundamentally, *Brown* stands for the proposition that racism, or apartheid, is not an acceptable Constitutional basis for public policy. Judge Sobeloff eloquently stated this point in a recent opinion:[35]

> . . . Certainly *Brown* had to do with the equalization of educational opportunity; but it stands for much more. *Brown* articulated the truth that *Plessy* chose to disregard: that relegation of blacks to separate facilities represents a declaration by the state that they are inferior and not to be associated with.

Indeed, the courts have invalidated racial classifications in many areas of public concern--ranging from public golf courses and parks to public beaches[36]—where equal educational opportunity was not at issue.

Treating *Brown* as an equal educational opportunity decision is disastrous. Professor Cahn noted more than 15 years ago that the constitutional rights of blacks or of other Americans should not "rest on any such flimsy foundation" as the social science data in the *Brown* record.[37] Fundamental human rights should not be recognized only upon a showing of favorable scientific evidence. Nor should those rights be withdrawn as less favorable evidence comes to light. Policies of apartheid in our public schools should not be resurrected because of new developments in educational research. Southern courts from *Stell v. Savannah-Chatham County Board of Education*[38] through the recent Fourth Circuit decisions in *Swann v. Charlotte-Mecklenburg Board of Education*[39] and *Brewer v. School Board of the City of Norfolk*[40] have given short

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[34]See generally Fiss, "Racial Imbalance in the Public Schools: The Constitutional Concept," 78 *Harv. L. Rev.* 564 (1965).

[35]*Brunson v. Bd. of Trustees of School District Number 1 of Clarendon County, South Carolina* (4th Cir., No. 14,571, June 5, 1970). See also *U.S. v. Jefferson County Board of Education*, 372 F. 2d 836 (5 Cir. 1966), where Judge Wisdom stated that "the separate school system was an integral element in the Southern State's general program to restrict Negroes as a class from participation in the life of the community, the affairs of the state, and the mainstream of American life; Negroes must keep their place."

[36]See, e.g., *New Orleans City Park Improvement Association v. Detiege*, 358 U.S. 54 (1958); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955).

[37]Cahn, "Jurisprudence," 30 *N.Y.U. L. Rev.* 150, 157, 158, 168 (1955).

[38]333 F. 2d 55 (5 Cir. 1964). See also *Jackson Municipal Separate School District v. Evers*, 357 F. 2d 653 (5 Cir. 1966).

[39]—F.2d—(4 Cir. May 26, 1970).

[40]—F.2d—(4 Cir., No. 14544, June 22, 1970).

shrift to arguments that the creation of a unitary public school system may be educationally harmful. While some experts have indicated that particular ratios of black and white students in each school may be educationally beneficial, these courts have rejected such formulas where they "defeat integration."[41]

Beyond the inherent problems in using social science data to define fundamental rights, it is clear that the courts, like educational researchers, have difficulty relating racial integration to schooling outcomes. As I indicated earlier, the evidence is too inconclusive to permit judicial intervention on this basis. We simply have no assurance that racial integration will raise the achievement of minority children.

Thus, the courts need not determine what the optimal degree of integration is to promote educational achievement—the task is only one of ensuring racial balance in the schools. Effects on achievement are incidental and irrelevant. The courts can—with difficulty—create standards and enforce them to achieve such balance, but fundamentally, the courts cannot relate integration to broader outcome goals. Under this view, all forms of segregation —whether described as de facto or de jure—must fall where they represent an implicit immorality, a badge of inferiority. It may also be the case that segregation by socio-economic class is unconstitutional under a similar analysis.[42] But for the reasons mentioned earlier, I reject the view—most clearly and recently expounded in *Keyes v. School District Number 1, Denver, Colorado*[43] —that a concept of equal educational opportunity which focuses on an equitable distribution of achievement can provide an adequate basis for judicial intervention in the desegregation area.

In the *Keyes* decision the court reviewed the testimony of James Coleman, an expert witness in the case, and summarized his views in the following passage:

> Dr. Coleman stated that a child's ability to learn is significantly affected by the educational stimulation provided by his family. Since Negro and Hispano children from low socio-economic families are typically not provided with this stimulation, a compensating stimulation must be provided by the peer group in the school. Where all children in the school come from families with similar low socio-economic status, the negative effect produced by family background is reinforced rather than alleviated. Dr.

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[41] *Swann v. Charlotte-Mecklenburg Board of Education*, —F.2d—(4 Cir., May 26, 1970).
[42] See *Brunson, supra.*
[43] —F. Supp.—(D. Colo., Civil Action No. C-1499, May 21, 1970). See also *Barksdale v. Springfield School Committee*, 237 F. Supp. 543 (1965), overruled 348 F.2d 261 (5 Cir. 1965).

> Coleman testified that although a racially isolated school is not inferior per se, it will inevitably provide an unequal educational opportunity where the racial or ethnic isolation involves a homogeneous study body all from uneducated and deprived backgrounds.[44]

On the basis of this and other expert testimony, the court held that "the only hope for raising the level of these students and for providing them the equal education which the Constitution guarantees is to bring them into contact with classroom associates who can contribute to the learning process; it is now clear that the quality and effectiveness of the education process is dependent on the presence within the classroom of knowledgeable fellow students."[45]

This rationale is inconsistent with the result that the court reached. The court ordered racial integration, and not socio-economic integration despite the clear meaning of the expert testimony. While it is true that a racial classification may greatly overlap with a socio-economic classification—in other words that many minority children will also be poor—under *Keyes* it is an acceptable alternative for the school system to submit a plan which integrates the black students with the poor white students. Further, there was no determination—nor could there be—as to the optimal balance of races or classes for purposes of raising schooling outcomes. Thus, in my view, the *Keyes* decision rests on the principle that racial segregation is a denial of equality to blacks. The equal educational opportunity holding is largely an attempt to avoid confronting the judicial bastion of de facto segregation. To the extent that this is true, the *Keyes* decision, and hundreds of other desegregation cases, are an appropriate exercise of the judicial power.

V. Equal Educational Opportunity and Resources

Equal educational opportunity has been interpreted by many to mean that each student must have equal access to educational resources—that is dollars, teachers, buildings, and equipment. The notion is not new to the law, for since *Plessy v. Ferguson* it has been established Constitutional doctrine that racially separate public facilities must be equal in terms of their tangible properties. This was also the basis for the more recent decision in the District of Columbia, *Hobson v. Hansen.* However, such scholars as John Coons have pressed for a more expansive doctrine, which would

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[44] *Ibid.*
[45] *Ibid.*

primarily benefit the poor.[46] In his view it is constitutionally impermissible for the state to discriminate among children on the basis of the wealth of the school district in which they reside. Regardless of our inability to evaluate the effects of particular school resources on the achievement of disadvantaged children, Coons would argue it is fundamentally unfair for the state to distribute its education dollars on a discriminatory basis. If money really does not affect educational performance, then white and middle class communities should have little hesitancy in allowing for a more equitable distribution of the state's resources.

There are a number of difficulties with the resources concept of equal educational opportunity.[47] If resources are defined as those educational inputs that affect educational outcomes, we are back where we began—we cannot identify those resources. Furthermore, there are many intangible but possibly important resources —such as teacher attitudes, teacher and student expectations, and school prestige, which the courts cannot affect. Yet, more obvious disparities in objectively measured resources may be corrected. From the standpoint of the judicial role, a simple standard such as dollar equality, or equal ability to command educational resources would be relatively easy for the court to enforce through its injunctive powers. The court should not be in the business of measuring the effectiveness of resources, but rather it should seek to achieve an equitable dollar balance—much as in the desegregation area, the courts should seek a racial balance.

Obviously, resource equality could prevent school districts from meeting the differential needs of school children. It could undermine compensatory educational programs which provide the poor with supplemental services, and it could undermine the American educational tradition which places control over local schools in the hands of local school officials. Professor Coons has attempted to meet these arguments by urging that the state may discriminate in the allocation of its educational wealth where there is a compelling interest in doing so. Presumably, Coons would allow supplemental services for the disadvantaged, the handicapped, or the mentally retarded. Further, Coons advocates a district power equalization scheme under which each district would receive the same amount of money at each tax level—regardless of the absolute number of dollars raised. Thus, each district could decide for itself the ex-

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[46]Coons, *supra.*

[47]See generally Michelson, "Equal Protection and School Resources." 2 *Inequality in Education* 4 (December 5, 1969).

tent to which it values education and it could spend money for that purpose irrespective of the narrowness of its tax base. While these developments and refinements are crucial to the adoption of a judicial standard which makes political and educational sense, they do not affect my basic contention that resource equalization —notwithstanding adverse holdings in the *McInnis* and *Burrus* decisions, is a task sufficiently manageable as to permit a judicial response.

As I have attempted to show, I am concerned about the feasibility or the desirability of judicial intervention in the educational process, where that intervention is designed to break the ties between race and class and school performance. However, the attitudes evidenced by those who advocate the liberal model have repercussions well beyond the issue of the propriety of judicial action. Rather, that model carries with it an unyielding faith that somehow educational expertise can perform miracles in resolving basic human difficulties. The model fails to recognize that education implies values which transcend technocratic expertise. More dollars, more buildings, more teachers do not necessarily mean better education. As Paul Goodman has preached again and again, there is a "brutal incompatibility of such a fanatically quantitative ethos with the qualitative life needs of the person."[48]

It is ironical, but the very absence of empirical evidence which should inhibit courts from interfering in the educational process, and which in a sense, frees the educator from legal accountability for schooling failures, may in the long run enable the judiciary to strike down many coercive educational practices. While the courts may not be very good at intervening affirmatively to equalize outcomes, historically, the courts have been able to play a negative role effectively. That is, courts may strike down coercive school policies which violate individual liberties, and which are premised on a woefully inadequate and nebulous expertise. No longer will educators be able to silence students under the guise of educational necessity, where the true reasons are inertia, tradition, or pedagogical or administrative convenience. Our present-day courts have placed far too great a reliance upon the judgment of educational experts. Vociferous discussion of current political issues in the classroom, where that discussion is not a part of the day's lesson plan may disturb some people, and may in some sense be deemed disorderly. But where is the body of empirical data supporting the proposition that such disorder impedes educational achievement?

[48]Roszak, *The Making of a Counter Culture* (1968).

Indeed, educational philosophers such as Paul Goodman and Edgar Friedenberg would urge that spontaneous discussion is a prerequisite to real learning.

In conclusion, I would hope that we have entered a new era where the inadequacies of educational expertise have become apparent, where many are beginning to challenge the notion that fundamental educational policy decisions should be made by an elite on the basis of its perception of how to improve educational quality. The courts should also be guided by this new wisdom.

A 'BIRDS-EYE VIEW' OF THE LAW GOVERNING EMPLOYER-EMPLOYEE RELATIONS IN LOCAL PUBLIC SCHOOL DISTRICTS IN CALIFORNIA

By Thomas A. Shannon*

Employer-employee relations in local public school districts in California are governed by the "Gordon H. Winton, Jr., School Employer-Employee Relations Act or the Winton Act." This law, contained in Sections 13080-13089 of the California Education Code, was first enacted in 1963 and extensively amended in 1970 by the California Legislature.

In brief outline form, the "Winton Act" may be summarized as follows:

1. *Applicability.* Applies both to certifica and classified employees of public schools.

2. *Purpose.* To promote improvement of personnel management and employer-employee relations and establish a statutory basis for public school employee representation.

3. *Right of Individual School Employee to Join Organization or Represent Self.* A school employee has right to form, join and participate in activities of employee organizations of own choosing *or* to refuse to join or participate in activities of such organizations.

4. *Interference with Right of School Employee to Join Organization or Represent Self Prohibited.* Both school board and employee organizations are prohibited from interfering with, intimidating, restraining, coercing or discriminating against public school employees because of their exercise of right to join *or* refuse to join employee organizations.

5. *Scope of Representation.* For *both* certificated and classified employees and employee organizations, it includes all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours and other terms and conditions of employment. In addition, for certificated employee organizations only, scope includes *procedures* relating to definition of educational objectives, determination of course content and curricula, textbook selection, and other aspects of instructional program to extent such matters are under legal control of school board.

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*Schools Attorney, San Diego Unified School District, San Diego Junior College District.

6. *Type of Representation.* A school board may represent itself or designate any person to represent it. Certificated and classified employee organizations may select their own representatives in any way they see fit to "meet and confer" with school board representative; however, where more than one *certificated* employee organization exists, school board representative must "meet and confer" with certificated employee organizations exclusively through "Certificated Employee Council," which represents all certificated employee organizations. Composition of "Council" is set forth in "Winton Act."

7. *"Meet and Confer" Process Defined.* Upon request, school board representative must "meet and confer" on all matters within scope of representation. In such process, both school board and employee organization representatives have mutual obligation to exchange freely information, opinions and proposals and to make and consider recommendations in a conscientious effort to reach agreement.

8. *Written "Agreements."* The "Winton Act" does NOT contemplate bilateral collective-bargaining type agreements; rather, any courses of action agreed upon in "meet and confer" process are implemented by the school board unilaterally enacting a resolution, regulation or policy adopting such courses of action. Also, it should be noted that school boards and employee organization representatives are NOT required by law to reach agreement; rather, they are required only to make a "conscientious effort" to reach agreement.

9. *Inability to Reach Agreement in "Meet and Confer" Process.* If there is "persistent disagreement" between school board and employee organization representatives, the issue is considered either (a) under a procedure to resolve the "persistent disagreement" which was developed jointly by the school board and employee organization representatives, or (b) by a tripartite panel with one member selected by each party and third member selected by both parties. Any findings or recommendations made to resolve "persistent disagreement" are strictly *advisory* only and do not bind the parties.

10. *Grievance Procedure.* Adoption of a "grievance procedure," which provides orderly process by which employees may test validity of application against them of existing school board policy, is not required under law; however, a school board has general legal authority to adopt such process provided final decision in any dispute remains with school board.

11. *Wage Proposals Are Public Records.* Certificated employee organizations must make initial wage proposals at public school board meeting and wage proposals thereafter are public records. This statutory requirement is not applicable to classified employee organizations.

12. *Executive Session Preparation for "Meet and Confer" process.* School board may meet in closed "executive session" to instruct its representative on its position relating to employee salaries and fringe benefits. (California Government Code Section 54957.6)

13. *Community College Academic Senate.* "Winton Act" does not restrict, limit or prohibit community college academic senate in making recommendations to Community College Board of Trustees or college administration on "academic and professional matters."

14. *No Right to Strike.* California case law holds that concerted strikes, work stoppages or slowdowns by public school employees are illegal and may be enjoined by Order of the Superior Court upon proper application by school board.

15. *Primacy of School Board.* The "Winton Act" specifically contemplates that the school board has the legal right and duty to make the "final decision with regard to all matters" under consideration in the "meet and confer" process. Moreover, nothing in the "Winton Act" limits or restricts the discretionary authority of a school board under law to take any legislative action it deems appropriate and necessary as the governing board of a public school district.

SPECIAL PROBLEMS OF LAND UTILIZATION

By M. A. McGhehey*

The simple economics of land use have now reached the schools. Some will say that it was long overdue, that school districts have been guilty of wasting valuable space for many years. By way of defense, school officials will point out that the minimum requirements for school building sites are usually dictated by state government, either by statute or by administrative regulation, and that there has been a trend over the years since the close of World War II to raise the minimum area and environmental requirements for school sites. However the fault issue may be resolved, some school districts are beginning to move in the direction of multiple use of sites, in order to achieve the greatest possible utilization of limited space. In a recent survey conducted by the National Organization on Legal Problems of Education of all cities of 100,000 or more population, some interesting projects were brought to light.

The first signifiant breakthrough occurred in New York City where the combined effect of the need for an alternative way of financing the costs of school building construction and the need for space for housing units produced an innovative approach which may set the pace for developments in other large cities. Beginning in 1966 with the creation of the New York City Educational Construction Fund, the city has produced several school buildings which are combined with apartment houses. The Fund was established by a special act of the New York State Legislature, and is authorized to issue tax-exempt bonds and bond anticipation notes to finance site and construction costs of projects which are built under the program. By the end of 1969 the total projected program had reached $330 million.

The plan is simple. The Fund issues bonds to acquire funds for construction of a school building in combination with additional space to be developed for private use. A private developer acquires air rights above the school building, and pays the Fund an annual payment to defray the cost of retiring the bonds and interest as they come due during the 99 year lease period. The developer constructs the school, and apartments or office space above the school. The developer pays no property taxes, but pays an equivalent amount to the Fund. The idea, originated by Lloyd K. Garrison, former president of the New York City Board of Education, has revolutionized school building construction in New York City.

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*Executive Secretary, National Organization on Legal Problems of Education.

P. S. 126 and Highbridge House illustrate the new concept, combining an elementary school for 1,200 pupils with 400 apartments for middle-income families in the Bronx. In Queens, a similar development involved the construction of P.S. 99, along with apartments. In Manhattan, Central Commercial High School was constructed with a 20 story office building in the air rights above.

The reverse option is also used. The school district has acquired air rights above a subway yard and station and over the New York Central Railroad yard for construction of schools.

These projects require a number of legal maneuvers. The first step is legislative authorization, since the school law of most states follows the general rule that specific statutory authority must be found for any proposed action. And while a number of respondents in the survey of school districts indicated that either constitutional or legislative action would be required, there was no indication that attempts had been made to secure such action. Administrative rules of the state education agency must be overcome, since there are usually some type of restriction on the environment of the school site. Local zoning restrictions have to be modified in order to accommodate private and public occupancy of the same structure in those states in which zoning regulations apply to school districts. Where the approval of building specifications by the local or state fire marshal is required, specific problems arise because of the varying requirements for private and public buildings. The same problem arises in connection with respect to building codes for electrical wiring. Set-back rules must be waived in order to obtain sufficient playground space.

In Miami, Florida plans have been perfected to construct an elementary school beneath elevated portions of Interstate 95. A two story structure, complete with playground, covering eight acres, is anticipated to be ready for occupancy by September, 1971.

Pontiac, Michigan began planning, in 1966, an inner city project which will combine a school building for 2,000 elementary school children with several types of community and cultural service agencies, such as the Office of Economic Opportunity, the Urban League, the local community college and recreational and social organizations.

Chicago has constructed a six story commercial high school in downtown Chicago with footings and foundations of sufficient strength to permit addition of a multiple story office building, which could be used either by the Board of Education, or rented

on a commercial basis. The Chicago school district has also cooperated with the Public Building Commission of Chicago for the construction of some $140,000,000 worth of projects for the school system. The school district will pay an annual rental to defray the cost of debt service for a specified number of years until ownership is transferred to the Board of Education.

Philadelphia, Indianapolis, Jacksonville, Minneapolis, Newark, Tulsa, Milwaukee, and Rochester, (New York) report that studies have been conducted for one variety or another of multiple use of space.

The slowness with which these projects move is indicative of the problems involved in dealing with several different levels of government, or several different agencies at the same level. It is likely that progress will be most rapid where the school district and municipal government are co-terminous, and where the costs of space are highest, thus making the multiple use attractive. In all probability, most of these projects will continue to use a lease arrangement, because of the difficulty of establishing mixed ownership between public and private owners under existing state law. The New York plan provides a buy-back clause to protect the public interest, should it become apparent at some time in the future that it would be desirable for the public to recover the air rights which have been leased to private developers. The cost of recovering such air rights would be prohibitive in early years, but would diminish with the passage of time.

It seems reasonably safe at this point to predict that there will be more innovative programs in this area as our population continues to grow in the large metropolitan centers. There is only a given amount of space in which to accommodate the living, working, learning, and recreational needs of a burgeoning population. Success in one venture will lead to a body of experience upon which even more ambitious projects may be constructed.

PARENTS' RIGHTS VIS-A-VIS SCHOOL CURRICULUM

By James W. Porter*

The question of parents' rights with respect to school curriculum was involved in a class action filed against the Topeka School District in January, 1970, by an individual parent whose children were attending the Topeka Public Schools to enjoin the school district from continuing its program of education in sex and human growth and development. (Clemmer v. U.S.D. No. 501, Shawnee County, State of Kansas, No. 112,064, District Court of Shawnee County, Kansas, decided May 12, 1970.)

In his petition, the plaintiff alleged representation of a group of persons in the class action who, along with himself, were parents of children who were being subjected to such sex education program without the consent of the parents, with the result that irreparable damage was being done to the health and well being of the children involved, to the parent-child relationship, and to the family structure.

The plaintiff further alleged, in substance, that the defendant's program of sex education and training was unconstitutional for the following reasons:

A. It violates Section 1 of the Fourteenth Amendment to the Federal Constitution for the reason that it destroys the parents' personal and inalienable rights to liberty and happiness in that it is designed to question parental authority by encouraging analysis, appraisal and criticism of parental authority. "That parents of children . . . have the right under this amendment to have their children taught, and the right not to have their children taught subjects or topics which are repugnant to the family and destroy the opportunity for the family to make its own moral and ethical value judgments on matters such as sexual behavior, sexual intercourse, contraception, marital, pre-marital and extra-marital relations, and the general aspects of family life;" and that plaintiff and parents whom he represents "have a right to select, within limits, what their children shall learn and this right is one of the liberties granted by the Fourteenth Amendment."

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*Member of Eidson, Lewis, Porter and Haynes, Topeka, Kansas, Attorney for Unified School District No. 501, Shawnee County, State of Kansas (Topeka Public Schools, Topeka, Kansas).

B. It violates the Ninth Amendment to the Federal Constitution for the reason that the right of parents to regulate what their children will be taught in the public schools of Kansas, is a right belonging to and retained by the people, and the defendant has assumed responsibility for such regulation without proper legislative authority in the area of sex education, when no such authority has been granted to the defendant by the legislature of Kansas.

C. The power and authority to conduct sex education and training has never been delegated by the people to the defendant by legislative action or constitutional provision, and, therefore, the same is reserved to the people by the Tenth Amendment to the Federal Constitution, and

D. This usurpation of power by the defendant in a matter of severe implication affecting the health, welfare and well being of the citizens of this state and the family structure is in violation of Article 20 of the Bill of Rights in the Constitution of Kansas, where there has been no grant of such authority by the citizenry of this state through their legislature.

The plaintiff also further alleged in his petition:

A. The use of public funds in the conduct of its program of sex education by the defendant without proper authority constitutes an unlawful diversion of such funds in violation of constitutional rights of the citizenry of the state; and

B. Defendant has abused its statutory authority and discretion in prescribing a course of study of sex education and training in violation of the constitutional rights of the citizenry of this state.

In pre-trial proceedings, plaintiff's counsel advised the Court that plaintiff was prepared to show that portions of the textbooks, class-room reading materials, motion pictures and Educational T-V telecasts, which were included in the defendant's program of sex education, were immoral, pornographic and detrimental to the best interests of the school children; and that plaintiff was further prepared to prove that some of the classroom teachers did not have proper educational qualifications to teach some of the aspects of sex education.

Counsel for the plaintiff conceded that the program of sex education in the schools was carried on in a purely secular basis with

no element of either religious or sectarian doctrines (such as those relating to divine creation of human bodies and souls); and that plaintiff was not claiming that the program violated the clauses of the First Amendment to the Federal Constitution, relating to establishment or free exercise of religion.

The case was tried to the Court without a jury and at the conclusion thereof the Court made extensive Findings of Fact in favor of the defendant on all of the issues of fact, and the following Conclusions of Law:

"1. Defendant is authorized by constitutional and statutory authority to conduct programs of education in promotion of the public health, welfare and morals;

2. The program of sex education being conducted by defendant is a reasonable exercise of its constitutional and statutory authority, and is reasonably related to the promotion of the public health, welfare and morals;

3. Defendant's program of sex education does not unreasonably restrict the liberty of plaintiff, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States;

4. Defendant's program of sex education is not conducted in violation of the Ninth or Tenth Amendments to the Constitution of the United States or section Twenty of the Bill of Rights of the Kansas Constitution; and

5. Judgment should be for defendant."

Final judgment was entered in favor of the defendant on May 12, 1970, and the plaintiff did not appeal.

At the outset, this lawsuit raised what appeared to be a new or novel issue, i.e., whether the rights and duties of parents include the right to control the curriculum in public schools, or to determine what should or should not be taught to their children, within the scope and protection of that part of Section 1 of the Fourteenth Amendment of the Federal Constitution which provides:

> " . . ; nor shall any state deprive any person of life, liberty or property without due process of law; . . . "

and comparable provisions contained in the Kansas constitution.

School district attorneys are familiar with the U.S. Supreme Court decisions such as *Cantwell v. Connecticut*[1] holding that the

[1] *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

liberties guaranteed by the First Amendment to the Federal Constitution have been made applicable to the states through adoption of the Fourteenth Amendment. They are also aware of a number of U.S. Supreme Court cases similar to *School District of Abington Township, Pa., v. Schempp*[2] wherein the Supreme Court struck down a state statute which provided for the reading of verses from the Holy Bible in the public schools as unconstitutional under the Establishment Clause of the First Amendment; and that in the Schempp decision, the Court further held that the fact that individual students may absent themselves upon parental request is no defense to a claim of unconstitutionality under the Establishment Clause.

Not so familiar, are decisions relating to the schools and alleged violations of section 1 of the Fourteenth Amendment. A frequently cited case on this issue is *Meyer v. Nebraska*,[3] decided by United States Supreme Court in 1923. In this case, the Court held a Nebraska statute forbidding the teaching in school of any other than the English language until the pupil has passed the eighth grade, as unconstitutional in violation of the Fourteenth Amendment to the Federal Constitution. The plaintiff in that case was a teacher who had been convicted of teaching the reading of the German language to an elementary school pupil in violation of the statute.

In the opinion, the Court discussed the broad general nature of the liberties guaranteed by the 14th Amendment, as follows:

> "The problem for our determination is whether the statute, as construed and applied, unreasonably infringes the liberty guaranteed to the plaintiff in error by the 14th Amendment. 'No state . . . shall deprive any person of life, liberty, or property without due process of law.'
> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.
> (citations omitted)

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[2]*School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed. 2d 844 (1963) (See also *Engle v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed. 2d 601 (1962); and *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed. 2d 228, (1968) holding invalid a state statute making it unlawful "to teach theory or doctrine that mankind ascended or descended from a lower order of animals."

[3]*Meyer v. Nebraska*, 262 U.S. 390, 67 L.Ed. 1042, 43 S. Ct. 625, 29 A.L.R. 1446 (1923) (See also *Bartels v. Iowa*, 262 U.S. 404, 43 S.Ct. 628, 67 L.Ed. 1047 (1923).)

"The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts.
(citation omitted)

"The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted. . . . Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.

" . . . Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think are within the liberty of the Amendment."

"That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all,—to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict within the Constitution,—a desirable end cannot be promoted by prohibited means."

The Court, did, however, carefully limit the scope of the decision by pointing out:

"The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. *Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy.* . . . No sudden emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition, with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary, and without reasonable relation to any end within the competency of the state." (Emphasis supplied)

In 1925, the United States Supreme Court struck down a statute of the state of Oregon which required all children between the ages of eight and sixteen years to attend *public* schools, in the case of *Pierce v. Society of Sisters.*[4] The defendants in that case were the Society of Sisters, a corporation conducting orphanages and

[4]*Pierce v. Society of Sisters*, 268 U.S. 510, 69 L.Ed. 1070, 45 S.Ct. 571, 39 A.L.R. 468.

parochial schools, and the Hill Military Academy, a private corporation operating for profit an elementary, college preparatory and military training school for boys. In its opinion, the Court stated:

> *"No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers, and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.*
>
> "The inevitable practical result of enforcing the act under consideration would be destruction of appellees' primary schools, and perhaps all other private primary schools for normal children within the state of Oregon. Appellees are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students, or the state. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.
>
> "Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, 67 L.ed. 1042, 29 A.L.R. 1446, 43 Sup. Ct. Rep. 625, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from *public teachers* only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." (Emphasis supplied)

The fact that the plaintiff in his action against the Topeka School District made no claim that the program of sex education in public schools violated the First Amendment religious guarantees and relied, principally, on the Fourteenth Amendment's prohibition against a state's depriving any person of "life, liberty and property without due process of law" made the plaintiff's position more difficult to sustain.

In *West Virginia Board of Education v. Barnette*,[5] a United States Supreme Court case involving the First Amendment, and a Resolution of the State Board of Education providing for compulsory flag salute and pledge of allegiance and for suspension of any

[5] *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 87 L.Ed. 1628, 63 S.Ct. 1178, 147 A.L.R. 674 (1943).

student refusing to join in the exercise on religious grounds, the court stated:

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. *The right of a State to regulate*, for example, a public utility *may well include*, so far as the due process test is concerned, *power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting.* But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case." (Emphasis supplied)

The Barnette decision indicates that the authority of a state limited only by the Due Process provisions of the Fourteenth Amendment "applied for its own sake," is greater than when the prohibitions of the First Amendment are involved; and that when the exercise of state authority is challenged under the Fourteenth Amendment alone, the courts will consider the rationally and reasonableness of such exercise, and whether the purpose of the exercise is to attain a permissible state objective.

It has also been held that the state may exercise regulatory powers over children and restrict the rights of parents under various circumstances. As stated by the United States Supreme Court in *Prince v. Commonwealth of Massachusetts*[6] upholding a statute regulating child labor:

> "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. (citations omitted) And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's wellbeing, the state as parens patriae may restrict the parents' control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. . . . The right to practice religion freely does not include liberty to expose the community or the child to communicable diseases or the latter to ill health or death (citation omitted). The catalog need not be lengthened. It is

[6]*Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 88 L.Ed. 645, 64 S.Ct. 438 (1944).

sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction . . .

"The state's authority over children's activities is broader than over like actions of adults . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens with all that implies. It may secure this against impending restraints and dangers, with a broad range of selection . . . It is too late to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action."

A Kansas case of assistance to the defense of the "sex education" case was the decision of the Kansas Supreme Court in 1966 in *State v. Garber.*[7]

The defendant in that action had been convicted of violating the Kansas compulsory school attendance law. He was a member of the Amish faith and had refused to permit his fifteen year old daughter to attend a secondary school after she completed the eighth grade in the public schools. He based his objection to her attending high school on sincere religious grounds, as explained by the Court:

"The agreed statement of facts also contains a history of the Amish people and a recital of their religious tenets and practices. . . . Opposition to public secondary schools derives from their feeling that eventually this exposure of their children to that secular influence will erode the Amish way of life.

"Defendant makes no general attack upon our compulsory school attendance law and indeed the validity of such laws has generally been recognized, for the natural rights of a parent to the custody and control of his child are subordinate to the police power of the state and may be restricted and regulated by municipal law providing minimum educational standards. (citations omitted) The promotion of education is a legitimate function of the state, and in Kansas is one particularly imposed on the legislature by article 6, section 2 of the constitution." (citation omitted)

The Court further stated in its opinion:

"In accommodating between the competing right of the state to compel action in the public welfare and the right of the individual to his constitutional religious freedom the courts have distinguished between religious beliefs and religious practices. *Failure to comply with reasonable requirements in the exercise of the police power for the general welfare has never been condoned in the name of religious freedom.*" (Emphasis supplied)

[7]*State v. Garber,* 197 Kan. 567, 419 P.2d 896.

and after reviewing a number of U.S. Supreme Court and state court decisions, the Court stated:

> " . . . We are not called upon to attempt to prescribe any permissible degree of secularity in education beyond which religious freedom is infringed. The question of how long a child should attend school is not a religious one. No matter how sincere he may be the individual cannot be permitted upon religious grounds to be the judge of his duty to obey laws enacted in the public interest (*Rice v. Commonwealth*, 188 Va. 224, 49 S.E.2d 342, 3 A.L.R.2d 1392). We think the particular law at issue here is valid as applied to defendant and his daughter and does not infringe upon constitutionally guaranteed religious freedom."

Although the court in the Garber case referred to the prohibitions of the Fourteenth Amendment of the Federal Constitution, the decision rests upon the determination that the law in question did "not infringe upon constitutionally guaranteed religious freedom" of the father and his daughter.

The voluminous documentary evidence and extensive testimony of witnesses at the trial of the Topeka sex education case, and the principal arguments of the defense, may best be summarized by quoting from the school district's brief, as follows:

> *"Defendant's Program of Sex Education*
> *is a Reasonable Exercise of Its Authority"*
>
> The question remains as to whether the action of defendant in providing for the challenged program of sex education in its public schools is reasonable, i.e., does the program in fact bear a reasonable relation to the promotion of education and the health and welfare of the public.
>
> It should be kept in mind that:
>
> > 'Changing local conditions create new local problems which may lead a state's people and its local authorities to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people. The Fourteenth Amendment did not strip the states of their power to meet problems previously left for individual solution.' *Everson v. Board of Education*, 330 U.S. 1, 91 L.Ed. 711, 67 S. Ct. 504 (1947).
>
> On behalf of defendant, several professional witnesses, highly qualified to express opinions as to the effect of defendant's program of sex education, testified that the program is reasonably necessary and proper to meet the needs of children, and is a proper part of a modern educational program at both elementary and secondary levels.
>
> Plaintiff offered the testimony of resident taxpayers and parents of children in defendant's schools, who testified they personally are opposed to defendant's program of sex education at all levels. However, they would not be opposed to a separate, elective course in grades 9 through 12. Prior to the 9th grade, they object to any education with respect to the reproductive system of humans or animals, human or animal growth and development in the embryonic stage or after birth, and the sociological and

psychological aspects of sex—with or without parental consent to such instruction. Plaintiff offered no expert testimony as to the need of children for a program of sex education in the public schools.

. . . there is ample evidence of record indicating that the determination of the State Board of Education and defendant that a program of sex education in the public schools promotes the education and the health, welfare and morals of the students in the public schools is reasonable and not arbitrary. At the very least, the evidence shows that the determination is subject to invalidation by the Court, *Grigsby v. Mitchum*, 191 Kan. 293, 302, P.2d 363 (1963). Plaintiff has wholly failed to sustain his burden of proving that defendant acted arbitrarily, capriciously and unreasonably in instituting the program of sex education as outlined in the position paper. (Exhibit 14) Defendant's program is in full compliance with the Guidelines of the State Board of Education, to which is committed, by the Constitution, the general supervision of public schools (Article 6, Section 2, Kansas Constitution) and for that reason the program cannot be said to be arbitrary action by defendant.

The program is objectionable and distressing to some, as shown by the fact of this judicial challenge. But it was the 'duty of the constituted authorities primarily to keep in view the welfare . . . of the many, and not permit the interests of the many to be subordinated to the wishes . . . of the few.' *Jacobson v. Massachusetts*,[8] supra.

Plaintiff contends that any course of study in defendant's schools below the ninth grade level with respect to the reproductive systems of humans or animals, the growth and development of humans and animals in the embroyonic stage and after birth, and regarding the sociological and psychological aspects of sex, violates plaintiff's rights under the Fourteenth Amendment and should be enjoined. He seeks to prevent such matter being taught to any child, regardless of the wishes of the child's parents. He also seeks to enjoin use of a part of the study material utilized in schools maintained by defendant—certain films—even though such films are shown only to students whose parents desire them to view the films.

It should be pointed out that plaintiff and the members of the class he represents are not compelled by law to send their children to the public schools operated by defendant. The law of Kansas requires that parents of children age seven to age sixteen send their children to a public school or to a private, denominational or parochial school taught by a competent instructor, for such period as the public school of their district is in session. K.S.A. 1969 Supp. 72-1111. A requirement that children attend the public schools would be unconstitutional. *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468 (1925). If plaintiff wishes to exercise his parental right to control the education of his children free from restriction by the defendant in providing the course of study, he is legally free to enroll his children in any school of his choice, provided only that such school meets the minimum state requirements. . . . "

"In the case at bar, plaintiff apparently seeks to educate his children in the public schools offered by defendant, but to exclude his children from exposure to certain subject matter, contrary to his personal beliefs, pre-

[8] *Jacobson v. Mass.*, 197 U.S. 11, 49 L.Ed 643, 25 S.Ct. 358 (1905).

scribed by defendant as part of the course of study in such schools. Further, he apparently seeks to enjoin defendant from offering such subject matter to any student below the ninth grade, and portions of such subject matter to those students in the ninth grade and above, whose parents desire it for their children. All this he claims as included within his 'liberty' under the Fourteenth Amendment. It is submitted that such is not the 'liberty' protected by the Fourteenth Amendment."

The plaintiff in the Topeka case was wholly unsuccessful in seeking an injunction against the school district's program of instruction in Human Growth and Development in the area of sex education. It may be that his case was weakened by his attack upon the entire program and its availability to children, other than his own, enrolled in the Topeka Schools. There were in fact many parents of children in the Topeka Schools who had no objection to the program and there were many who were anxious that their children be given the benefit of such education.

If the plaintiff had confined his action to the ground that he had a right to have his children excused from participating in those portions of the school district's program of sex education to which he objected, or if he had limited his action for the benefit of himself, and his children, and contended and established that it was based upon bona fide religious beliefs, his chances for success may have improved.

During the course of the proceedings in the Topeka case, research disclosed only one case directly related to the teaching of sex education in public schools. This was the case of *Margaret Aki Medeiros v. Ralph H. Kiyosaki, Superintendent of Education, et al.*, Civ. No. 27353 in the Circuit Court of the First Circuit, State of Hawaii, which was fully tried, and judgment was entered April 21, 1969, dismissing the plaintiffs' complaint and their prayer for injunction.

A case decided shortly after the Topeka case is *Drake, et al. v. Independent School District No. 1 of Tulsa County, Oklahoma,* No. C-69-1946 in the District Court of Tulsa County, Oklahoma. In that case the Court on June 29, 1970, sustained a Motion for Summary Judgment on behalf of the school district.

Since the trial of the Topeka case, the case of *Cornwell v. State Board of Education,* 314 F. Supp. 340, is reported in the issue of Federal Supplement, of October 5, 1970. This case was decided in the United States District Court for the District of Maryland on August 22, 1969. It was a civil action by Baltimore County taxpayers against the Maryland State Board of Education to enjoin

the implementation in the Baltimore County elementary and secondary schools of a program of sex education, pursuant to a by-law adopted by the State Board. The plaintiffs contended that the by-law violated the Establishment Clause of the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Federal Constitution. It was similar to the Topeka case in that the plaintiffs sought to enjoin the entire program of sex education, rather than simply to have their children excused from the program. The U.S. District Court in the Cornwell case dismissed the complaint on the ground that it failed to raise a substantial constitutional question, stating in its opinion:

"(4) In determining whether there is here a substantial question of constitutionality, this Court concludes initially that no question whatsoever arises under the Fourteenth Amendment. There is first no denial of substantive due process to the plaintiffs. Under Section 6 of Article 77 of the Maryland Code (as amended and re-codified by Chapter 405 of the Acts of 1969), the State Board is directed to determine the educational policies of the state and to enact by-laws for the administration of the public school system, which when enacted and published shall have the force of law. Assuredly it cannot be said that the by-law here is an arbitrary or unreasonable exercise of the authority vested in the State Board to determine a teaching curriculum, nor that there is no basis in fact for the legislative policy expressed in the by-law. Furthermore, it does not appear that the by-law denies equal protection of the laws, as on its face it applies to all pupils equally. . . . "

"(6) The plaintiffs further assert that they have the exclusive constitutional right to teach their children about sexual matters in their own homes, and that such exclusive right would prohibit the teaching of sex in the schools. No authority is cited in support of this novel proposition, and this Court knows of no such constitutional right. This Court, then, is satisfied that the claims asserted in this complaint under the Fourteenth Amendment are so insubstantial that they do not confer jurisdiction here. "In support of their First Amendment claim, the plaintiffs assert that they have been denied the free exercise of their religious concepts and that the teaching of sex in the Baltimore County Schools will in fact establish religious concepts. . . . "

In respect to the claim of plaintiffs under the First Amendment that "they have been denied the free exercise of their religious concepts and that the teaching of sex in the Baltimore County Schools will in fact establish religious concepts. . . ." the Court, after discussing a number of U.S. Supreme Court decisions involving the First Amendment, concluded:

"(7) Applying these principles that have been established by these various cases, it is quite clear to this Court that the purpose and primary effect of the by-law here is not to establish any particular religious dogma or

precept, and that the by-law does not directly or substantially involve the state in religious exercises or in favoring of religion or any particular religion. The by-law may be considered quite simply as a public health measure. As the Supreme Court indicated in Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), the State's interest in the health of its children outweights claims based upon religious freedom and the right of parental control. The Court in that particular case said this (at pages 168-169, 64 S.Ct. at page 443):

> 'A democratic society rests . . . upon the healthy, well-rounded growth of young people into full maturity as citizens . . . It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary.' "

The decision in the Maryland case was affirmed by United States Court of Appeals, Fourth Circuit on June 9, 1970 *(Cornwell v. State Board of Education,* 428 F.2d 471, published September 28, 1970).

The courts of the various states have reached conflicting decisions on the rights of a parent to select courses of studies from those offered to be taught his children, and to have his children excused from those courses to which the parent objects. As stated in 47 Am. Jur., Schools No. 201:

> "The authorities are in some conflict as to the limits of the respective powers of parents and school authorities over the course of study to be pursued by a particular pupil. According to some decisions, a parent has the right to make a reasonable selection of studies for his child to pursue from the list prescribed by the local authorities. On the ground that the selection by the board constitutes a reasonable regulation binding on parent and pupil, other cases hold that the selection by the school authorities is final, and that the parent has no right to pick and choose therefrom. The line of demarcation most consonant with reason and authority would seem to be that the parents, having the primary and controlling interest in the welfare of the pupil, may control the course of his education so far, and only so far, as they may do so without impairing the efficacy of the school system and the interests of other pupils."

Numerous cases, as cited in the annotation thereto, do not involve the rights of parents to control the school curriculum or the courses to be offered. Such cases relate, primarily, to the rights of parents to choose among the courses offered, which they desire to be taught or not to be taught to their children.

THE NON-TENURED TEACHER AND THE CIVIL RIGHTS ACT OF 1871

By Haskell C. Freedman*

Between 1866 and 1875 Congress, in response to the problems which arose in the South due to the emancipation of the slaves, enacted a series of statutes intended to secure full constitutional rights to our then newly freed black brothers. The purpose of these statutes it can be clearly seen from the words of the United States code, Title 28, Section 1985, which reads in part: "If two or more persons in any state or territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving . . . any person . . . of equal privileges or immunities under the laws . . .", was to provide our new citizens with judicial protection against the horrors of such organizations as the Ku Klux Klan and also a method insuring that recalcitrant state and local officials would treat them equally."

One of this series of statutes, enacted in 1871, and considered by many authorities to be the most far reaching of them all, will be the basis of my talk here today.

Title 28, Section 1983, of the United States Code, entitled "Civil Action for Deprivation of Rights" states:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Congress having thus established a specific "cause of action" for any deprivation of a constitutionally secured right subsequently obviated any question of district court jurisdiction by enacting Section 1343 of Title 28 of the United States Code which reads, in relevant part:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the

*General Counsel, Massachusetts Teachers Association.

United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

The question then becomes, as the title to my talk indicates, how does The Civil Rights Act of 1871, enacted to protect the then newly freed slaves, apply to, and provide protection for, non-tenured teachers?

First of all, non-tenured teachers are citizens of the United States. Secondly, school committee members are persons who act under the color of state law. Therefore, the only requirement left to be fulfilled to fall within the protection of the statute is that the school committee deprive the non-tenured teacher of some right, privilege or immunity secured to him or her by the constitution. The issue then is whether non-tenured teachers have any rights, privileges or immunities under the constitution that will be recognized by the courts.

The answer, fortunately, is yes. For, as the Supreme Court has consistently pointed out in many of their recent decisions, and as they so succinctly stated just last year, teachers' constitutional rights are "not shed at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed. 2d 731 (1969). But, as I'm sure you are aware, the courts have not granted teachers full rights.

This reluctance on the part of the courts to rule in favor of teachers was originally based on the notion that teaching, like other forms of government employment, was a privilege—A doctrine which has been specifically rejected by the Supreme Court *(Keyishian v. Board of Regents,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed, 2d 629 (1967)). The courts now rely heavily on the rationale that a teacher's rights must be balanced against the interests of the school in performing its appointed function. (I will discuss this balancing test more fully later).

The question we are left with then, is what rights have non-tenured teachers been able to secure through judicial recognition by suits brought under the Civil Rights Act of 1871. Well, let us look at some of the cases and see.

In the beginning the suits were basically traditional First Amendment cases. The landmark case in the area of teachers' rights, *Johnson v. Branch,* 364 F.2, 177 involved the dismissal of a black teacher, in a state without tenure laws, for her involvement

in civil rights activities. The court held that a teacher may not be discharged for exercising his or her constitutional rights so long as the exercise of such did not materially interfere with his or her duties as a teacher. This balancing test, as it later came to be called, was more fully enunciated by the Supreme Court in *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 811 (1968). In *Pickering* a teacher was dismissed for sending a letter, critical of the school administration, to a local newspaper. The court noted that while teachers enjoyed full constitutional rights, the exercise of these rights must be balanced against the "vital interest" of the school committee in performing its appointed function. The burden, however, is upon the school committee to show that the teacher's exercise of his or her rights materially interferes with the performance of his or her duties. The court held in *Pickering* that the school committee had not met this burden.

Of further interest in the *Johnson* case is that the disciplined teacher was a probationary one and the school committee's action against her was their failure to rehire her for a subsequent year. The case, however, does not provide strong authority for the proposition that a probationary teacher is entitled to the same rights as a tenured teacher when the probationary teacher is not rehired. This is so for two reasons. First, Mrs. Johnson had been employed by the defendant school committee for nearly twelve years in a system without tenure, and further, there was no question of her competence and quality as a teacher. Second, the issue was not merely a failure to rehire, but rather clearly a civil rights issue.

Johnson v. Branch, however, opened the door for a plethora of suits wherein teachers alleged that their dismissals, either by discharge during the school year or by the non-renewal of their contracts, were due to the exercise of constitutional rights. With the exception of one case, *Parker v. Board of Education,* 348 F.2d 464 (4th Cir. 1965), the federal courts have uniformly held that a non-tenured teacher may not be dismissed for constitutionally impermissible grounds.

In *Parker* the Fourth Circuit Court of Appeals held that the issue was governed by the teacher's contract which provided for dismissal for any reason or no reason at all; and therefore, the school committee could not be questioned as to why it fired the plaintiff. This position, however, has been specifically rejected in *Pred v. Board of Public Instruction,* 415 F.2, 851 where the Fifth Circuit Court of Appeals said:

"Equally unpersuasive is the related argument that since there is no constitutional right to public employment, school officials only allowed these teachers' contracts to expire, and thus they cannot be liable for violation of any rights protected by Sec. 1983. But in the posture of this case this misconceives the whole thrust or their claim. The right sought to be vindicated is not a contractual one, nor could it be since no *right* to employment existed. What is at stake is the vindication of constitutional rights—the right not to be punished by the state or to suffer retaliation at its hand because a public employee persists in the exercise of First Amendment Rights." (Emphasis supplied) (Supra at 856).

With the basic proposition accepted—that a public school teacher's employment cannot be categorized as a privilege and therefore terminated at the will or whim of a school committee for any reason or no reason at all where such termination was due to the teacher's exercise of a constitutionally guaranteed right—the courts began to compile the list of protected rights and the extent to which they may be exercised, the cases falling into, what seems to me, one of six general areas—in-class speech, out-of-class speech, civil rights activity, other out-of-class activity, personal appearance and loyalty.

In the area of in-class speech the courts have held that discussion of demands for campus freedom were not necessarily anathema to a college literature class absent a showing that the prescribed curriculum was not being covered *(Pred v. Board of Instruction,* 415 F.2d 851 (5th Cir. 1969)); that the study of an article in a national magazine, wherein "profane" language was used and discussed, was not improper in a high school *(Keefe v. Geanakos,* 418 F.2d 359 (1st Cir. (1969)); and that a college professor's expression of his opinions on various relevant issues did not provide a basis for the termination of his services where he was not afforded an opportunity to answer charges that he had been neglectful of his duties *(Roth v. Board of Regents* (310 F. Supp. 972 (W. D. Wis. 1970)). However, it has been held that a civilian instructor teaching English to foreign officers at an air force school was properly discharged for using his class as a forum for his personal ideas when he was hired to give a quick, comprehensive course in English *(Goldwasser v. Brown,* 417 F.2d 1169 (D. C. Cir. 1969)).

In the out-of-class speech area the Supreme Court has held that a teacher stands in no less of a position than any other citizen unless his criticism is directed at his immediate superior, in which case he or she is still constitutionally protected absent a showing that this exercise of his or her right to free speech impairs the working relationship. *(Pickering v. Board of Education, supra.)*

Turning to the category of civil rights activity, and I have designated these cases in a specific area because of their historical genesis, which we need not go into now, the courts have uniformly held that a non-tenured teacher cannot be dismissed for his or her involvement in civil rights activities. *Rackley v. School District Number 5,* 258 F. Supp. 676 (D.S.C. 1966); *Williams v. Sumter School District Number 2,* 255 F. Supp. 397 (1966).

And similarly with other out-of-class activity, the courts have held that a non-tenured teacher cannot be dismissed for serving on a jury *(Bomar v. Keyes,* 162 F.2d 130 (2nd Cir. 1947) or for union activity *(Pred v. Board of Public Instruction, supra);* Jones *v. Hopper,* 410 F.2d 1323 (10th Cir. 1969); *McLaughlin v. Tilendis,* 398 F.2d 287 (7th Cir. 1968)).

As to personal appearance, the only case in the area, *Lucia v. Duggan,* 303 F. Supp. 112 (D. Mass. 1969), stands for the proposition that there must be some showing on the part of the school committee that the teacher's appearance affects his or her ability to teach or somehow disrupts the order and discipline of the school.

And finally, in the area of loyalty, the Supreme Court in a line of cases, *Cramp v. Board of Public Instruction,* 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed. 285 (1961); *Shelton v. Tucker,* 364 U.S. 479, 81 S.Ct. 637, 100 L.Ed. 692 (1960); *Beilan v. Board of Education,* 357 U.S. 399, 78 S.Ct. 1317, 1324, 2 L.Ed. 2d 1414, 1433 (1958); *Slochower v. Board of Higher Education,* 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956); *Wieman v. Updegraff,* 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952), has held that public employment cannot be conditioned on a teacher's political affiliations and beliefs so long as there is no interference with his or her duties as a teacher—that is, so long as he or she does not use the teaching position to proselytize.

As a general proposition, in those cases where a non-tenured teacher has asserted the deprivation of a traditional first amendment right, he has succeeded where the facts sufficiently supported his or her argument. However, in the area of due process non-tenured teachers did not fare so well at the beginning. One of the early cases, *Freeman v. Gould Special School District,* 405 F.2d 1153 (4th Cir. 1969), specifically held *inter alia,* that under the state law in question, the school committee had complete discretion with respect to hiring teachers, and could, therefore, refuse renewal of a one-year teaching contract for whatever reason it deemed proper as long as it did not violate the teacher's constitu-

tional rights—the court clearly referring to First Amendment rights.

However, as I said, this was one of the early due process cases being decided in January of 1969. As you shall see, this doctrine has not survived very long. Let us take a closer look at the genesis of the non-tenured teacher's right to due process.

At first the due process questions were intermixed with constitutional issues. Teachers were discharged for violating rules and regulations which the court held either did not exist at the time of the supposed violation or while existing had been applied in an arbitrary and capricious manner so as to discriminate against the teacher in question. Two First Circuit cases in which I and Mr. Philip A. Mason, an associate with our law firm, represented dismissed teachers are perfect examples of this genesis.

In *Keefe v. Geanakos, supra,* the plaintiff, a tenured teacher, was suspended (discharge action was pending when suit was instituted) for cause "For assigning an article in the September, 1969, issue of Atlantic Monthly in which some "profane" language was used. The Court of Appeals, reversing the District Court's refusal to grant a temporary restraining order, held that the school committee could not discharge or otherwise discipline the plaintiff for his "Academic consideration" of the Article in question where other books and articles which had similar, if not the same words in their text, were in the school library and part of students' required reading. The court reasoned that the school committee could not, consonant with due process, censor certain material which it found distasteful while it condoned and approved similar material.

Similarly, in *Lucia v. Duggan, supra,* a probationary teacher was discharged during the school term for his refusal to shave his beard. The court, while unable to specifically find that the wearing of a beard was specifically protected by the constitution, held that the wearing of a beard was at least an interest of the plaintiff, which interest could not be effected by state action without due process of law. The court went on to find that the "supposed school policy" against the wearing of beards was not an actuality until the school committee decided to confront this recalcitrant teacher; and, therefore, Mr. Lucia's discharge could not be sustained. In so holding, the court specifically noted that a teacher could not be discharged or otherwise disciplined where he did not have adequate notice, prior to his act or omission, that such an act or omission was proscribed.

The *Lucia* case in effect was the first case which solely ruled on the due process rights of a probationary teacher under the Fourteenth Amendment. This holding, however, is limited to its facts—David Lucia's discharge occurred during the school year. Further involved in the case was the plaintiff's interest in his personal appearance—an interest which could not constitutionally be deprived unless there was some showing that it interfered with his performance as a teacher. For though the court did not find the wearing of a beard specifically protected, clearly it falls within the penumbra of the right of privacy as enunciated by the Supreme Court in *Griswold v. Connecticut.*

The trend in federal court protection of non-tenured teachers' rights has not halted with the *Lucia* case, however. Recently several courts held that irrespective of the constitutional issue *vis a vis* the reason for the dismissal, a non-tenured teacher's interest in his employment is protected by the Fourteenth Amendment from arbitrary and capricious action by a school committee. In two companion cases in the district court for the Western District of Wisconsin, *Roth v. Board of Regents of State Colleges, supra,* and *Gouge v. Joint School District No. 1,* 310 F. Supp. 984 (W.D. Wis. 1970), Judge Doyle held that neither a public school teacher nor a college professor could be dismissed without being afforded a "due process hearing." *Roth* was a case of a nontenured college professor who was not rehired after one year of service, and *Gouge* involved two teachers, one who was not rehired after five years of service on one-year contracts and the other who had not been rehired after eighteen years of service on one-year contracts. The court reasoned that due process required that there be some basis in fact for the termination of a teacher's services and that such a determination required a hearing with its attendant procedural requirements and safeguards. To the argument that such a requirement would unduly impede a school committee in its "Proper evaluation of probationary teachers," the court in *Roth* noted that its requirement of a hearing did not go to the issue of what constituted a basis in fact. Judge Doyle went on to point out that he recognized that different standards should be applied to probationary teachers as distinguished from tenured teachers, and that the basis in fact test for probationary teachers did not rise to the level of the "For cause" test applied to tenured teachers. But he was equally quick to point out that while the tenure—nontenure classification had a rational basis *vis a vis* the test to be applied on dismissal, that classification did not provide a basis for

differentiating as to procedural due process—that is, the classification is valid as to substantive due process but invalid as to procedural due process.

This same reasoning was followed by the District Court for the Southern District of Ohio in *Orr v. Trinter,* et al,—F. Supp.—(S.D. O. August 12, 1970). Here plaintiff was notified that after one year of teaching that his contract was not to be renewed. He was offered an opportunity to resign with the understanding that no record would reflect any deleterious information. Plaintiff refused. A meeting of the school committee was then held at which the plaintiff was present. He, however, did not take part in any of the discussion. Subsequently he was notified that he was, in fact, not to be rehired for the coming school year. At no time was the plaintiff ever informed of the reasons for the school committee's action.

The court in sustaining plaintiff's claim that he had been denied due process in that he had not been informed of the reasons for his non-renewal, and in that he had not been afforded a hearing at which he could present his case and confront his accusors, quoted with approval Judge Doyle's opinion in *Roth, supra,* and went on to note that the failure to renew a teacher's contract so effected his or her ability to obtain future employment that the court could see no difference in effect between non-renewal and an actual discharge. Such being the case, the court reasoned that no less of procedural safeguards could be afforded on non-renewal than those required on discharge—that is, a due process hearing. As the court pointed out, the interest protected is a teacher's being free from the threat or reality of dismissal on arbitrary or discriminatory grounds. This same position has been taken by the Commissioner of Education of Rhode Island. *Domenicone v. School Committee of the Town of Smithfield,* Decision of William P. Robinson, Jr., Rhode Island Commissioner of Education, May 20, 1970.

The Fifth Circuit has also recently enunciated a similar doctrine. In a series of cases, *Sinderman v. Perry et al,*—F.2d—(5th Cir. August 10, 1970); *Lucas v. Chapman et al*—F.2d—(5th Cir. August 6, 1970); and *Ferguson v. Thomas et al,*—F.2d—(5th Cir. June 23, 1970), the Court of Appeals has held that where a teacher's contract is not renewed, and if there is an expectancy of continued employment, then the school committee must afford the teacher full procedural due process and show cause why his con-

tract should not be renewed. If, on the other hand, there is no expectancy of continued employment, the teacher is still entitled to a hearing. However, in this case he must initiate the administrative process by requesting a notice of reasons and a hearing. Further, the burden is now on him or her to show that there is no basis in fact for not renewing his or her teaching contract.

This differentiation between the class of teachers who have an expectancy of continued employment and the class that doesn't, follows from the court's attempt to differentiate probationary teachers from non-probationary teachers in a system where there is no tenure as is the case in most of the states under the Fifth Circuit's jurisdiction. In other words, a teacher who has an expectancy of continued employment would be equivalent to a tenured teacher, and therefore could not be discharged or not rehired except "for cause," while a teacher without an expectancy of continued employment would be equivalent to a probationary teacher who could not be not rehired unless there was a basis in fact for the school committee's decision.

What we have, then, is a complete circle. In the earlier stages of academic freedom, litigation concerning non-tenured teachers' rights, as well as tenured teachers' rights, were predicated upon the principle that their employment was a privilege, and therefore could be terminated by their employing school committee for any reason or no reason at all. Then courts began to recognize that teachers, too, had constitutional rights—rights which "were not shed at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District, supra.* Once this doctrine was enunciated the Federal Courts began to reason that due process also applied to school teachers. And now, finally, the courts have begun to grant probationary teachers due process rights even when they are merely not rehired.

What is behind this judicial recognition of non-tenured teachers' rights to due process is the courts' understanding that education is the source of strength of our Democracy, and that to insure that a teacher may feel free to teach the most unorthodox philosophies, from the extreme right to the extreme left; he or she must work in an environment which is free from arbitrary, capricious and discriminatory reprisals. The teacher must feel that there is no "Heavy Hand" looming in the far corridors, waiting to place its weight of disapproval upon his or her shoulders when he or she exposes his or her students to anything of a controversial nature,

even where he or she is only on a probationary status. I need not emphasize to you, ladies and gentlemen, that our strength as a country rests upon the *Free* flow of ideas, teachings and philosophies; and that if our teachers are to assume their proper role, the role which the Supreme Court has recognized, they must be free to teach. And that freedom rests on the absence of arbitrary, capricious and discriminatory reprisals—exactly what due process is intended to prevent.

As Mr. Justice Frankfurter stated in his concurring opinion in *Wieman v. Updegraff:*

> "That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and critical inquiry are acquired in the formative years of our citizens. The process of education naturally enough has been the basis of hope for the perdurance of our democracy on the part of all our leaders from Thomas Jefferson onwards."
>
> "To regard teachers—in our entire system, from the primary grades to the university—as the priests of our Democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster these habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift the evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure the freedoms of thoughts, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or state government." (Supra, at 196).

SOME LEGAL AND PRACTICAL IMPLICATIONS OF DECENTRALIZATION

By Dr. Norman Drachler*

Since August 11, 1970, when your president invited me to speak, I have had two different boards of education, have been without a board quorum for nearly three weeks, and have acquired 43 new board members as of November 7, 1970, who will take office on January 1, 1971. I have also been informed by press, radio and liberal groups, who were asleep on election day, that we now have the most conservative board of education in Detroit since 1917, when the ward system was abolished.

During this interval, I have witnessed four liberal board members recalled for endorsing integration, have been involved in four different court actions relating to decentralization, and am currently awaiting a return to federal court on or about December 7 —unless something happens between now and that date. My last appearance in court was on Wednesday, November 18, the day before yesterday.

Just prior to August, I have also been a party to a number of other suits: a suit on free lunches, two issues relating to suspension of students, two court actions over disqualification of ineligible football players, and a grievance procedure over agency shop. In addition, our state has just gone through a state-wide referendum on the issue of parochiaid, accompanied by all the visceral reactions that this issue brings forth.

What are some of the factors which influenced legislative action for decentralization in Detroit? The Detroit Public School System has about 300,000 students of whom 63 per cent are black. Since 1950 our population declined by nearly 400,000 people, and the public school enrollment increased by nearly 65,000 students. We are confronted with some of the same concerns that face most large cities. Failure to provide quality education for many of our children, particularly the poor and disadvantaged; a steady stream of mobility within the city; an increasing number of segregated schools; a continued erosion of our city tax base; a disproportionate growing population of the poor and the aged; and an increasing credibility gap between the school system and certain segments of the community.

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*Superintendent of Detroit Public Schools.

The Detroit Board of Education is fiscally independent and currently operating with a $20 to $25 million dollar cumulative deficit. We are spending about $400 less per child than are some of the communities that surround us. Merely to attain the same number of professional employees per thousand pupils to equal the state average, we would need an additional 1,200 staff members and about 1,000 new classrooms.

Mobility is an important educational factor in Detroit. Last year, between September 18 and June 10, two weeks after the opening of school, and one week prior to graduation, forty per cent of our students moved from one school to another. The rate of mobility ranged from about 8 per cent in the most stable school, to 112 per cent in the poorest area of the city. Many children moved several times during the school year. As school communities change in ethnic and socio-economic groupings, unrest and fear mount on the part of the total community. Everyone speculates as to how the newcomers will affect the community and the quality of education in the schools.

Today's tragedy is that research on the relationship of poor education to poverty is not new. Nearly 200 years ago Robert Coram, of Delaware wrote:

> ". . . It is a shame, scandal to civilized society that part only of the citizens should be sent to colleges and universities to learn to cheat their liberties."

The National Report on City Slums in 1901, Robert Hunter's famous survey on poverty in 1904, and many other studies, all fell upon the deaf ears of educators and society.

A study on education in large cities states:

> "We have seen that a large part of all the children in our public schools fail to make normal progress. They fail repeatedly. They are thoroughly trained in failure . . . Under our present system there are large numbers of children who are destined to lives of failure . . . Success is necessary to every human being. To live in an atmosphere of failure is tragedy to many . . ."

I have just read an excerpt from the first known study on dropouts in New York City, published in 1909, and the title of the study is: *Laggards in Our Schools.* The study pointed out that most youngsters in large cities finish the fifth grade, one half completed the eighth grade, and one in ten graduated from high school. Today, in 1970, about seven in ten finish high school. An eighth grader in 1910 could then obtain a job more readily than a 10th

grade dropout could today. A high school diploma is no longer as optional today as it was before World War II.

School retardation in 1909 in New York was studied by nationality groups. According to the report, students of German origin performed the best, only 16 per cent were retarded. These students did better than native-born Americans, of whom 19 per cent were retarded. And, the study concluded, that the Irish with 29 per cent, and the Italians with 36 per cent retardation were the least successful in school. Ironically, today the children and grandchildren of these immigrants are fleeing the cities—fearful that the new immigrants to the large cities will harm their children's educational environment.

There was and is a growing concern on the part of parents and staff that notwithstanding Head Start, federal aid and compensatory programs, we are not making adequate progress in our schools. Although the educational gap between white and black has been narrowed, what has been done has been far from satisfactory. Yet, what little has been achieved, particularly with the help of Title I funds, indicates that school systems could meet the challenge if both society and the educational system would recognize the urgency and be willing to act boldly in the reconstruction of our educational system.

Thus, due to the shortcomings in education, plus the frustrations in the areas of desegregation or integration—there arose all about us a sense of urgency—particularly in the black community. I share the sense of urgency and recognize the historic basis of the black community's grievance in education. As I understand black consciousness, it seeks to cast aside dependency and establish a sound, viable base upon which the black community can best function to meet its needs. As a school administrator who lives with reality 24 hours a day, I recognize this approach as an essential element of a free society. Healthy coalitions will come only when black and white approach one another as equal partners in quest of a common cause.

In a sense, the American public school system has really gone "public" only after World War II. The revolution in technology which accompanied World War II and the civil rights revolution which followed, raised the aspirations of millions of Americans and did not create the institutions necessary to help realize or fulfill these aspirations. Decentralization and greater opportunities for decision making at the local level seemed to hold out hope to

many who were seeking ways and means to bring about the change in our school system.

I regard decentralization as a process rather than a program or a blueprint. The nature and the guidelines of the program should be determined by its participants—parents, staffs, boards of education—and to a certain degree, at the high school level, students. The process should provide for shared accountability, flexibility, and experimentation that will lead to educational improvement.

These concerns were expressed in Detroit, although over 40 per cent of our teachers are black, and nearly 35 per cent of our administrators are black. In a sense, Detroit is more ready for decentralization, due to the fact that the black middle-class has not left the city and therefore will be actively involved in the development of decentralization programs for *their* children, as well as others.

I do not consider decentralization a panacea for all educational ills, but I do regard it an important and necessary ingredient for the improvement of our schools. The danger lies both in the rigidity and complexity of the school system, as well as in the oversimplification by critics who are either bored or impatient with the complexities in our society.

The Kerner Committee on Civil Disorders recommended seven major strategies to improve large city school systems. One of these was enlarged participation by parents in decision-making. The other six cost money. Without additional funds for services needed in large cities, decentralization can become an exercise in futility.

Detroit Decentralization Plan

In August of 1969, our State Legislature enacted Act 244, which required the Detroit Board of Education to divide its school district in not less than seven, and no more than 11 regional school districts, with not more than 50,000 nor less than 25,000 students in each district. Whereas the New York decentralization bill was quite lengthy, our Act 244 consisted of only one page.[1] The guidelines developed in the New York bill were not included in our legislation. This task was left to the Central Board to develop prior to January 1, 1971.

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[1]See Appendix A.

The Central Board of Education held nine hearings on the question of determining the new regions. Prior to the hearings, a majority of the board members clearly indicated that in addition to the State requirements, the Board would attempt to divide the districts in keeping with the one-man—one-vote concept, and second, it would seek to establish regions so that optimum integration could be achieved. The Board was aware that we had many segregated schools. Nevertheless, these were the result of de facto segregation. Since it was now being asked to draw new lines, it therefore sought ways and means to bring about integration.

I think it is fair to summarize these hearings by stating that the majority of black participants who appeared were for decentralization, but with strong emphasis on community control. The majority of whites who participated were opposed to decentralization and asked for a referendum on the issue. A number of black spokesmen proposed regions which were predominantly black and white. Many of the white spokesmen still indicated their opposition to decentralization, but indicated that if it had to come, they too preferred the separate districts or regions. One community-control group, predominantly black, recommended a plan where the range of black students in regions would run from about 8 per cent in one to 95 per cent in another. The Board simultaneously engaged outside staff and consultants to help do the job. In the last weeks of March the Board reviewed publicly seven different plans, though it had not reached an agreement as yet. It indicated that one of these plans or an amended one would be presented.

On April 7, 1970 the Board of Education by a four to two vote (the fifth "yes" vote was in the hospital) approved a plan for seven regions. (See pages 88 and 89.)

In this plan was included a recommendation from the superintendent to change the feeder patterns of 18 junior high schools so that over a period of three years, 12 senior high schools would achieve greater integration. The proposed changes were all in adjacent high school areas; they simply changed the boundary line between those high schools to run east and west, rather than north and south. The plan had the support of the Michigan Civil Rights Commission the Detroit Commission on Community Relations, the NAACP, the Metropolitan Detroit Council of Churches, the Urban League, and others.

The reaction of the white community was one of strong opposition. The Board was flooded with messages of strong protest. Of

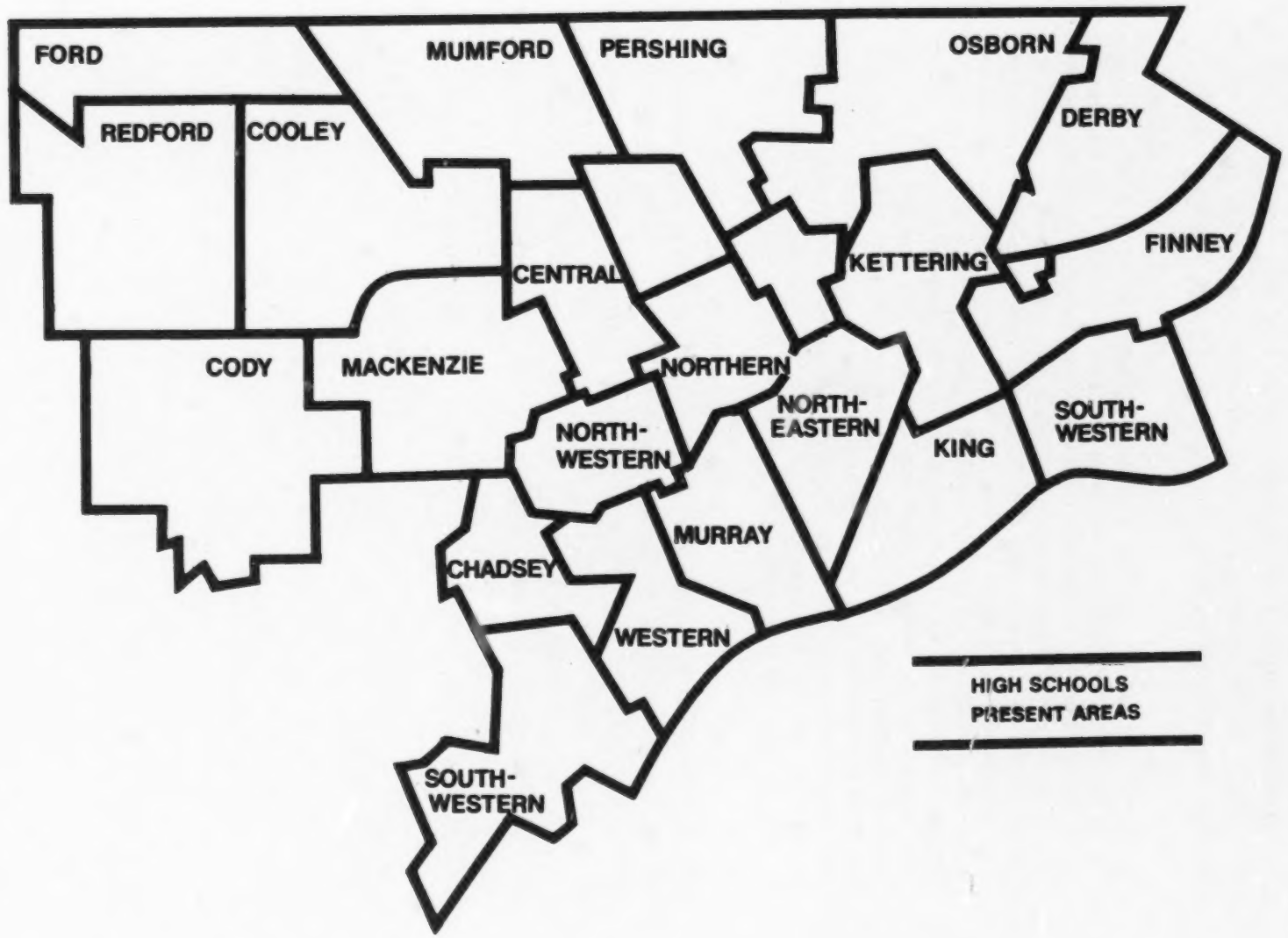
the 31 speakers who appeared on April 7, 27 opposed the plan. The black leadership that had formerly proposed separate plans did not appear in opposition on April 7, although one of the 27 speakers who opposed the plan was a black parent.

The Board anticipated some of the community reaction, but it did not expect the emotional reaction of the state legislature, prior to a fall election. Two days after the Board's action, on April 9, 1970, the House of Representatives amended Act 244 by voting that there shall be 11 regions, that high school boundaries must be drawn so that each student attends the high school nearest his home, and that the total plan be placed for referendum before the city's voters. On the following day, the State Senate simply repealed Act 244. Since neither bill was approved by both Houses, Act 244 remained in effect.

Despite the endorsement of the Board's actions by Commissioner James Allen, Father Hesburgh of the United States Civil Rights Commission, Professor James Coleman and others, a recall movement was started against the four Board Members who had voted for the plan. On July 7, 1970 the State Legislature repealed Act 244 and replaced it with Public Act 48, which mandated the establishment of eight regions to be determined by a Commission appointed by the Governor. This Act also included a provision, Section 12, which reads as follows:

> The implementation of any attendance provisions for the 1970-71 school year determined by any first class school district board shall be delayed pending a date of commencement of function by the first class school district boards established under the provisions of this amendatory act, but such provisions shall not impair the right of any such boards to determine and implement prior to such date such changes in attendance provisions as are mandated by practical necessity. In reviewing, confirming, establishing, or modifying attendance provisions, the first class school district boards established under the provisions of this amendatory act, shall have a policy of open enrollment and shall enable students to attend the school of preference, but providing priority acceptance in so far as practicable, in cases of insufficient school capacity, to those students residing nearest the school and to those students desiring to attend the school for participation in vocationally oriented courses or other specialized curriculum.

This Act stopped the Central Board from implementing the new regions until the newly elected regional boards came into power January 1, 1971. The new central board was to be composed of 13 members—five elected at large, and eight from the various regions. Thus there would be a total of 45 board members.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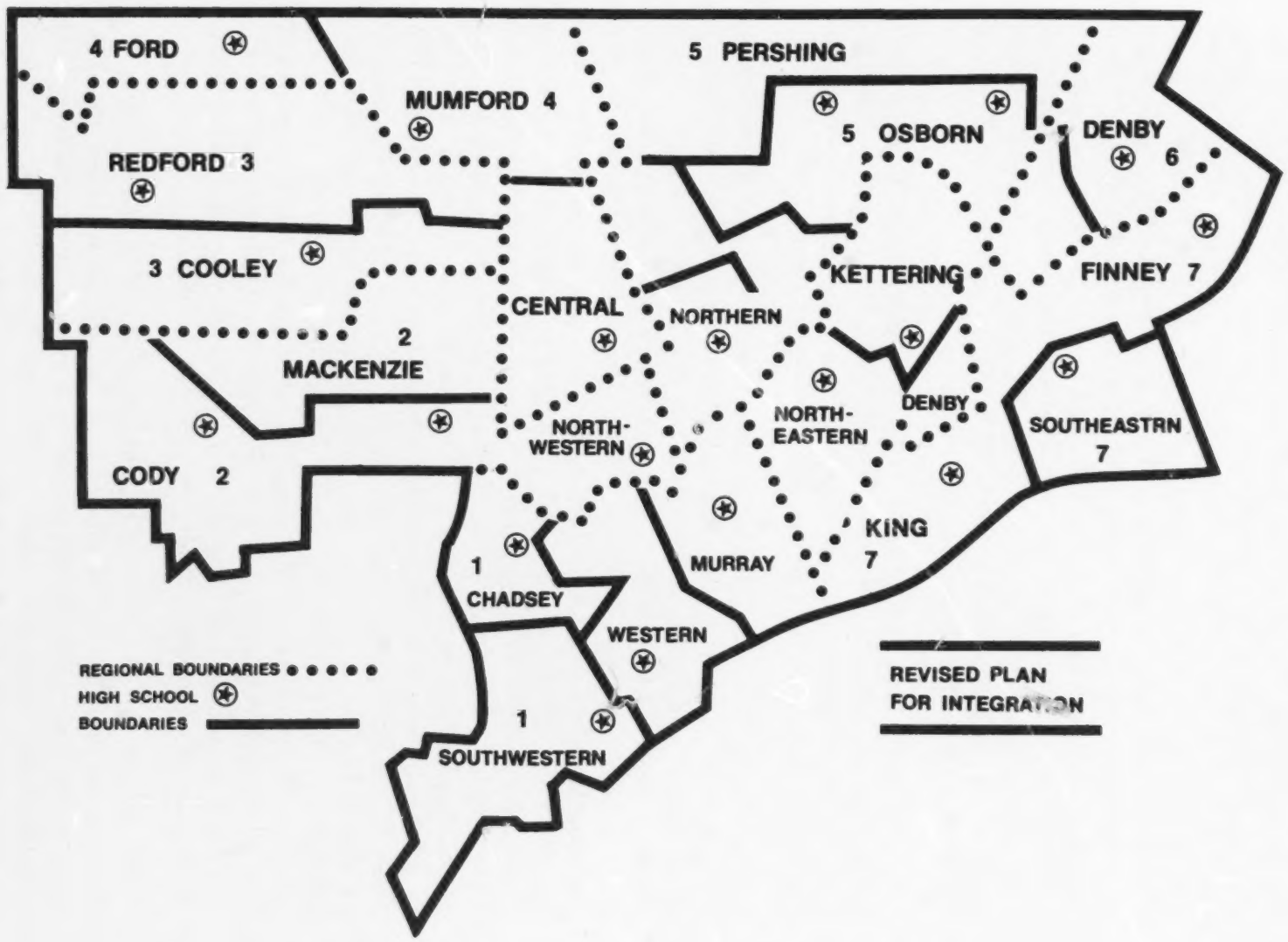
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SOUTHWESTERN
REGIONAL BOUNDARIES
HIGH SCHOOL
BOUNDARIES
REVISED PLAN
FOR INTEGRATION

The recall movement against the four board members who voted for integration continued, despite the legislative action and despite the fact that three of the four would go out of office December 30, 1970. On August 4 the four board members who voted for integration were all recalled. The vote consisted of only 23% of the registered voters, but nevertheless, it is not certain what a larger turnout would have brought about. Due to mechanical difficulties as a result of the introduction of a new voting system, the recall was not certified for three weeks and I was without a quorum during this period. Following certification the Governor appointed four members to serve on the Board of Education and they began their work following Labor Day 1970. This new Board of seven began the task of developing guidelines.

In the meantime, on August 19, 1970, the NAACP filed suit against two sections of Public Act 48, as well as against the Detroit Board of Education, the Governor and the Attorney General. The court date was set for the end of August 1970.

The NAACP suit, Ronald Bradley vs. William T. Milliken, Governor of Michigan, etc., asked Federal Judge Roth to issue a declaratory judgment and called for the implementation of the April 7 plan immediately. The hearing began about one week prior to the opening of school. After three days of hearings, the Judge refused to issue a declaratory or restraining order, since this involved the merits of the total case, and set date for hearings on November 4, 1970. On September 3, the very same day that Judge Roth denied the application for a preliminary injunction and granted a motion to dismiss the Governor and Attorney General of Michigan as parties defendant—arguments were heard in Nashville, Tennessee by the chief judge of Circuit Court at the request of the NAACP of Detroit. On September 8, 1970, the day that schools opened in Detroit, the Chief Judge of Circuit Court entered an order denying the request for a preliminary injunction, but advanced the appeal for a hearing on its merits before the United States Court of Appeals for the Sixth Circuit. This hearing began in Cincinnati, Ohio on October 2, 1970.

The Court (on October 2nd) addressed itself to three issues: 1) the constitutionality of Section 12 of Act 48; 2) whether the District Judge had used his discretion in denying the application for a preliminary injunction; and 3) whether the District Court erred in dismissing the Governor and Attorney General as parties defendant.

On the first issue, the United States Court of Appeals for the Sixth District ruled as follows:

One, "We hold Section 12 of Act 48 to be unconstitutional and of no effect as violative of the 14th Amendment By this ruling on the invalidity of Section 12, we express no opinion at the present stage of the case, as to the merits of the plan adopted by the School Board on April 7, 1970, or as to whether it was the constitutional obligation of the School Board to adopt all or any part of that plan."

Two, "Although holding that Section 12 of Act 48 is unconstitutional, we cannot say that the District Judge abused his discretion in refusing to grant a preliminary injunction upon the basis of the evidence introduced during the three days of hearings . . ."

Three, "Defendants' appeal from the order of the district court dismissing the Governor and Attorney General of Michigan as parties defendant. We hold that the Governor and Attorney General are proper parties, at least at the present stage of the proceedings."[3]

On November 4, 1970 we were back before Judge Roth in Detroit. Although a trial of several weeks was anticipated, Judge Roth ordered on that same day ". . . that no later than November 16, 1970, defendant Detroit Board of Education submit a high school attendance area plan to this court consisting of that portion of the action taken by defendant Detroit Board of Education on April 7, 1970, going to the changing of attendance areas of certain named high schools in the City of Detroit, or an updated version thereof which achieves no less pupil integration: the said plan to be submitted to this court as to become effective and shall be implemented on the first day of the Spring semester of the school year 1970-71, being February 1, 1971."

This is where we are today. Despite the difficulties and frustrations that we have experienced, I still regard decentralization as a necessary step in a very large city. The only lesson we can learn from our experience is that it would be much wiser for large city boards to take steps in this direction in a meaningful and positive manner prior to state or court action. It is possible that a similar reaction might have occurred in our community. Nevertheless, Detroit's experience may prove useful to other large cities facing a similar challenge.

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[3]Bradley v. Milliken, Case No. 20794, U.S.Circuit Court of Appeals Sixth Circuit, October 13, 1970.

Appendix A

State of Michigan

75th Legislature

Regular Session of 1969

Introduced by Senators Young, Brown and Cartwright

ENROLLED SENATE BILL NO. 635 (ACT 244)

AN ACT to require first class school districts to be divided into regional districts and to provide for local district school boards and to define their powers and duties and the powers and duties of the first class district board.

The People of the State of Michigan enact:

Sec. 1. Not later than January 30, 1970, the school board of each first class district shall divide its district into not less than 7 nor more than 11 regional school districts with not more than 50,000 nor less than 25,000 students in each district.

Sec. 2. In addition to the present members of the first class board there shall be elected by the registered and qualified electors of each district to the first class board 1 member from each of the districts for a term of 4 years. The members of the first class school district board provided in section 2 to be elected by regions shall be elected in the general election to be held in November, 1970 and every fourth year thereafter for a term commencing on January 1 next following their election. The candidates shall be nominated in primary elections in the manner provided by law for the present first class school district members.

The term of office of the present first class school board members shall hereafter be 4 years. The terms of office of present first class school board members which expire June 30, 1971 are extended to January 1, 1973. The term of office of present first class school board members which expire June 30, 1973 are shortened to January 1, 1973. The 5 at large positions on the first class district school board which expire January 1, 1973 shall be filled at the general election to be held in November, 1972 for a term of 4 years. The terms of office of present first class school district board members which expire on June 30, 1975 are extended to January 1, 1977 and shall be filled at the general election to be held in November, 1976 for a term of 4 years.

Sec. 3 In each regional district there shall be elected 9 members to the regional board. No person shall be elected who is not a resident of the regional district from which he is elected. The members shall be nominated and elected by the registered and qualified electors of each district as is provided by law for the nomination and election of first class school board members except that signatures required on nominating petitions shall be not less than 500 nor more than 1,000. The members shall be elected for terms of 4 years. Except that of the members elected at the general election in 1970 the 5 members receiving the highest number of votes shall be elected for a term of 4 years and the 4 members receiving the next highest number of votes shall be elected for a term of 2 years.

Sec. 4. The first class school district board shall retain all the powers and duties now possessed by a first class school district except for those given to a regional school district board under the provisions of this act.

Sec. 5. Effective upon the commencement of its term of office, the regional school district board, subject to guidelines established by the first class district board, shall have the power to:

(1) Employ and discharge a superintendent for the regional school district from a list or lists of candidates submitted by the district board.

(2) Employ and discharge, assign and promote all teachers and other employees of the regional school district, subject to review by the first class school district board, which may overrule, modify or affirm the action of the regional district board.

(3) Determine the curriculum, use of educational facilities and establishment of educational and testing programs in the regional school district.

(4) Determine the budget for the regional school district based upon the allocation of funds received from the first class school district board.

Sec. 6. The rights of retirement, tenure, seniority and of any other benefits of any employee transferred to a regional school district or between regional school districts from the first class district shall not be abrogated, diminished or impaired.

Sec. 7. The first class school district board shall perform the following functions for the regional school districts:

(1) Central purchasing.

(2) Payroll.

(3) Contract negotiations for all employees, subject to the provisions of Act. No. 336 of the Public Acts of 1947, as amended, being sections 423.201 to 423.216 of the Compiled Laws of 1948, and subject to any bargaining certification and to the provisions of any collective bargaining agreement pertaining to affected employees.

(4) Property management and maintenance.

(5) Bonding.

(6) Special education programs.

(7) Allocation of funds for capital outlay and operations to each regional school district.

(8) On or before November 1, 1970, establish guidelines for the implementation of the provisions of section 5.

DECENTRALIZATION

By Ben Hubbard*

As a professor (and I hope an educator), I hope to set the stage for problems to be discussed later in our meeting by discussing the general case for decentralization. Dr. Drachler has indicated that he would deal with a single city so I have taken the liberty to discuss the general topic.

In a recent copy of *The School Administrator,* Dr. Luvern L. Cunningham, Dean of the College of Education at Ohio State University, said:

> "The concept of decentralization must be the product of a sick mind. Otherwise, why would it drop bomb-like when we are inundated with so many other problems?"

As an educator, I found the statement easy to agree with when I spent a month in New York City during their strike over this very issue, while at the same time recognizing the "tongue in cheek" approach of Dr. Cunningham and knowing in my mind that it was happening because "happen it must." Dr. Cunningham, along with most educators, knows that decentralization is with us as a part of the deep-seated unrest of our time. Dr. Cunningham suggested in his article that

> " . . . decentralization is a spin-off of deep-seated and far-reaching problems in the larger society—problems that have to do with powerlessness, alienation, and distrust of all institutions. . . . "

I might suggest that one of the institutions most suspect by many distressed persons is the law.

Decentralization may fail to satisfy the deep-seated social problems which have caused it to be considered: we can in fact be sure that it will fail to satisfy all or nearly all of these problems. If this is true, why try? The answer lies in that organization never solves problems it just makes it possible to deal with them. We will always live with great stress in the schools so we had best be about the job of learning to understand this way of life.

In 1969, in the booklet *"A Study of Urban Education, A Report by the Urban Studies Sub-Committee of the Tenth School Problems Commission, State of Illinois,* the speaker said, "I believe the time for decentralization of the major urban school systems of America has come." I did not believe then nor do I believe today that a legalistic decentralization of power, responsibility or even

finance would solve the problems of the cities. I did feel then and still believe that genuine decentralization—decentralization that gave some or much control to local communities—would help persons to believe in education again. If nothing else can be accomplished by decentralization this is worth the try, and I believe that much more can be accomplished.

Let me clarify what is meant by decentralization. For me, it covers the spectrum from administrative decentralization to turning real power over to local boards. The latter is commonly known as community control. The degree of decentralization will to some extent determine the legal problems involved. In the urban studies report based on a year and a half study that took me to Baltimore and New York plus extended contacts and visits in Illinois, I summarized some principles or concepts that I held then despite the fact that some of them seem to be contradictory. However, they are for me still crucial and I would like to summarize these for your consideration as you think of the problems connected with decentralization.

a. Parents, particularly parents of minority groups, want "in on the action" of deciding the future educational opportunities of their children.
b. Many professional educators do not believe that parents should have anything to say about how students are educated, a well-disguised position but a real one nevertheless.
c. Different cities and different communities will find different kinds of decentralization desirable and workable. . . .
d. Community control is misunderstood as it affects local school districts in schools outside of the major cities by many citizens and district board members, where they have been selected, in our large cities. Some of this misunderstanding has, in my judgment, come from the fact that despite statutes authorizing it, state officials have seldom "come down hard" on major city boards to force them to conform to state laws or the state's way of doing things. As a result, many urban dwellers observe local boards in suburbs and rural areas; they then ascribe the powers which they feel their city boards have always had to the local boards and say "give it to us." This position is based on not understanding real limits set for other boards, but it does help to explain some positions taken by city patrons. An example of what I am describing would be a newly created area, or district, boards in the city which feel that the power to hire and fire means just that. State law has been responsible for great stability of faculty in most states of the Union and for many reasons not related to urban problems, race or civil rights. . . .
e. The uneducated citizen, as well as the educated, should understand what the school is doing for his children and whatever system of control used, that system must provide this information and must, in turn,

be able to respond to the citizens' desires or demands without undue delay. . . .

f. Decentralization of control or operation can only be accomplished without serious confrontations and bitterness if it is thoroughly planned before acting and the plan is conscientiously carried out by all parties.

g. The enactment of a proposal to decentralize is going to be difficult, if not impossible, unless a power outside the city establishes the rules for decentralization and enforces them. This I believe because of the vested interest of people in all cities that run counter to the result of decentralization. Only the state legislative body can, in my judgment, design or adopt and enforce a workable plan for decentralization. . . .

h. Specific legislative resolution is almost never a good solution to a local problem, but legislative guidelines have, through many years, set up the limits of community control of local government and these have worked. Properly done, the legislatures of the several states can develop systems of guidelines for giving the people of major cities much more to say about their schools, much as the several legislatures have set up guidelines for the organization of school districts outside the major cities. It is even possible and may be desirable to enact into law guidelines that let the several cities of a state set up different decentralization plans. . . .

i. Citizen interest in schools must be real and the schools must remain close to parents if the best learning situations are to develop. . . .

j. Systems, whether educational or not, can get too big to be able to respond to individual needs. I believe our major cities have reached this point in education and, I suspect, in other fields as well. Someone in a radio interview recently seriously raised the question of whether New York City could be governed. Being governed or operated and responding to need and control *may be two* different things. The large systems, by their very bigness, make it extremely difficult for an individual to be heard.

k. When citizens, students and staff members discover that they cannot go through channels to be heard, they search out other ways. Examples of persons looking for other ways to express themselves are numerous; but student riots, teacher strikes, and demonstrations are all partial methods used to break outside, regular or non-responsive channels.

l. The major city school systems do many things well. Special schools, experimental projects and just plain good education can be found in abundance. Purchasing in many systems is extremely efficient, even though in some cases it takes too long to function. Excellent examples of this can be found while some cities still operate outmoded systems. Many outstanding spokesmen for education and its value are developed in the large cities. . . .

m. When local or district boards are formed in communities, these boards and their administrative staff must know what powers they will have and what powers are to be reserved to the city and to the state in advance of the time which they are expected to exercise power.

n. Implied criticism of bigness or of the hierarchy of city school systems should be thought of separately from an evaluation of persons in the

hierarchy. Most individuals with whom I have visited and whom I have observed in the cities are extremely competent and, in the jobs given them, I feel that they are generally excellent. Any implied criticism of the cities and their operation must be understood apart from an evaluation of the jobs done by individuals. I have seen few educators individually more competent than those found in the big cities.

The real legal problems it seems to me lie in a number of *areas.* In the interest of time, I merely list them.

1. Finance—we may decentralize expenditures but taxing, appropriations, and equalizing seem to present real problems. How to deal with finance while decentralizing causes the architects of legislation many headaches.

2. Employees in a central system may not fit the jobs in a new structure—human obsolescence must be dealt with. Already many able administrators by the standards of yesterday have had their positions abolished or changed and they have been assigned to routine (sometimes clerical) duties. Social problems such as race complicate this problem further.

3. New administrative skills will have to be developed to cope with coordination rather than absolute control.

4. School men must learn to live with a certain amount of confusion as a way of life. This will include frequent court appearances.

5. Accountability systems must recognize that all solutions are not yet measurable and many such items are found in our large cities.

Each educational concept which I have alluded to is wrought with legal problems. Our task as educational legal persons or legal educators is to find ways to make experiments work while developing sound legal structures to assure their success. The legal field from local board regulations to state statutes to Supreme Court decisions will look very different when decentralization has been accomplished. Local boards may have vastly different duties, state statutes will allow different things to happen rather than require conformity, and since 1954 the Supreme Court has become more and more involved in education at all levels and for social as well as educational purposes.

If we are to save our urban educational systems, some workable organization will have to develop. Decentralization in all of its aspects may serve only as a beginning.

SOME LEGAL AND PRACTICAL IMPLICATIONS OF DECENTRALIZATION

By Dr. Bernard Shulman*

It is well understood that school districts are the basic structural units for carrying out the state function of education, and that the authority to carry out this function exists with a school board or school committee. Historically, we know that the school board is indeed a legally unique type of state agency. A variety of case law has interpreted our school boards as public corporations, municipal corporations, quasi-municipal and quasi-public corporations. What is generally understood is that the school board is restricted in the kind and degree of responsibility it can confer on subordinates or outside parties. Until recently, we must remember, education in our country has been characterized by a consolidation process—a growth of the school district into a regional complex by the merging of smaller units. The economic advantages of these consolidations have proven themselves. In Massachusetts, there has been a growth of some 80 regional school districts. On the other hand, the Courts have upheld subdelegation in some restricted cases.

Conroy v. City of Battle Creek, 314 Mich. 210, Michigan 22 N.W. 2d 275 (1946)
McGovern v. Patterson, 80 N. E. 2d 667 (1948), New York
Gawboni v. Otoe County, 67 N.W. 2d 489 1954), Nebraska

In such cases, careful study indicates that the delegated duties involved minor decision making power; and where such delegation was permitted, the intent of the legislature was argued as an implied power, which power was usually needed to permit the agency actually to survive. The arguments have reached out beyond the school context for justification of decentralization without state statute, because until recently there have been very few instances of decentralization of substantial authority in the school systems. The point made here is that the courts will note that since there is no counterpart to a school board, precedents which exist in other agencies must be viewed with caution.

A study and review of the events connected with school decentralization in the past few years indicates a common set of objectives:

1. Increase of opportunities for citizens to participate in the finalization of school policy.

*Assistant Superintendent of Schools, Boston, Massachusetts.

2. Greater awareness of individual school and local community needs and the increased responsiveness that hopefully can result.
3. The ability to prescribe policy that avoids conformity and recognizes local needs, so that educational improvement for a greater total of individual students results.

In Massachusetts, Boston, like other large cities, has undergone an organizational decentralization into six Areas. A district superintendent has located an office in the field which is easily accessible to the citizens of his school area. The school administrators report directly to the Area Assistant Superintendent. Within each area, a variety of Parent and Community Involvement Projects have been instituted. The Assistant Superintendent can identify with many organizations and agencies which make up his complete community.

For the interests of those who are not familiar with some of the Boston projects, may I briefly mention the King-Timilty Coalition which has been Federally funded and charged with the responsibility of meeting the above noted objects of bringing educational excellence to local schools.

The purpose of this project was to involve at the "grass roots" level, school and community representatives and all available resources in the development and operation of a prototype comprehensive program to make a significant impact upon the most critical needs and educational problems of a community designated target areas.

Let me read from the objectives of this Coalition noted in the original proposal.

Objectives

The problems of innercity schools that serve largely disadvantaged and minority group populations are beginning to command the interest, if not the resources, that will be necessary if vast numbers of children are to be afforded anything like equal educational opportunity. The diversity and complexity of these problems are matched by the confusion and uncertainty among professional educators, government officials and interested lay parties, as to what can and should be done. We are short on knowledge, there is keen competition for scarce resources, and events have in some measure foreclosed options that might have been promising even a year or two ago. Thus, in many cities, "compensatory education" programs initiated with such high hopes are becoming suspect

among those they are designed to help. School departments, not used to encouraging any sort of "interference" from outside parties, are now confronted by demands for "community control" or at least for decentralizing the control of schools within their jurisdiction. The climate is such that, even where good will is present in the school administration and in the community, what is considered a novel and significant overture by one party is frequently dismissed as an empty or now irrelevant gesture by the other.

Two priority actions were instituted in Boston:

1. Community-School Advisory Councils having the full sanction of the Boston School Department and the Boston School Committee were established to serve the Martin Luther King, Jr. Middle School and the Timilty Junior High School. For the King Middle School, the Council consisted initially of the "Coalition" which functioned informally with members of the Boston School Department. (This group was made up of representatives from the teaching and administrative staff of the King School, Operation Exodus, Inc., Pathways to Identity Project, The King Home and School Association, and the OMEC of the Harvard Graduate School of Education.) For the Timilty School, the Council consisted initially of representatives of the teaching and administrative staff of the school, representatives of community agencies, parents, and other resource agencies they wished to have assist them in preliminary planning for the project. Both these groups called on other sources for technical assistance such as the State Department of Education, the New England Regional Lab (EDC), the regional office of HEW, or various colleges and universities.

2. (a) It was necessary to provide these groups with funds to choose and purchase technical assistance that was necessary for planning of operational program components.
   (b) Funds were also necessary to mount an intensive summer campaign to organize parents in the area of the two clusters of schools to insure the broadest possible degree of community participation in the developing project. When this effort had a chance to produce results, elections were held that elected Advisory Councils. The Councils expanded to afford membership to parents and teachers in the feeder elementary schools.

Programs and structure created such change within the schools as improved the effectiveness of their educational offerings and stimulated community interest in the schools.

Through the combined efforts of elected community people, teachers and parents, two junior high schools and all their respective elementary feeder schools have been operating with a local Council for the past three years. The project director is a member of the community with offices and staff operating with but apart from the school administration.

Mention can also be made of the involvements of parents in the Trotter-Lewis and Copley Square Schools in Boston, which make up the Model Demonstration Subsystem. In this plan, not only parental involvement but teacher and student involvement has evolved in a most decentralized manner. Both projects are on-going and should be watched carefully. It is from this Boston perspective that I wish to add several comments to Dr. Drachler's presentation.

In New York, the main features of the final Decentralization Bill divided the city into 30-33 local districts with at least 20,000 pupils. The Central Board also assumed the responsibility of acting as an appeals agent which can supersede, suspend or remove a local district board or any of its members. The Legislative process in New York has suggested that the Legislature wants to witness with caution what can and will happen with these decentralization efforts. What is possible? What is feasible? What will be the effects of the political process? What will happen to the political climate? Can progress toward the established objectives of greater parental involvement and greater school responsiveness be made? Is the assumption correct that greater responsiveness will result not only in greater variety but in richer educational experiences and the development of superior schools?

Only the passage of time will indicate how the New York State Legislature will choose to deal further with decentralization.

In Michigan, we have learned that the proposed division of Detroit into 8 regions and the change of the feeder patterns of several high schools is an attempt to add to the total effectiveness of other adopted policies.

Public Act 48:

1. Divided Detroit into regions and of at least 25,000 students.
2. Election of Regional Boards.

This act has been criticized as a duplication of authority that might cost seven million dollars in increased administrative expenses. It would also seem that enormous legal difficulties are inherent in adopting any plan under Act 48. What one hopes will be demonstrated is that the quality of education under this Act will be increased. Will the regional district better be able to diagnose its needs and implement more locally prescribed educational experiences of benefit to *all* students of that region? If this happens, then the decentralization effort will be strengthened.

However, if the new diversity results in greater polarization and greater administrative difficulty, then perhaps the *practical* implications will overshadow the present legal focus. The law is but a vehicle for future educational gains. The findings of the future will speak for themselves.

In *Bradley v. Milliken,*[1] the trend toward finding a balance between court order and the School Board directive is involved. Courts in the past have been reluctant to interfere with the discretionary powers of the School Board; however, when Constitutional Rights are involved, the Courts have spoken clearly. We are now in an era of seeking a balance not only when Courts initiate an order, but when Boards initiate a policy. In this case, the Board did not have to delay, but the Court at first did not say it *must not delay.*

The Detroit decentralization plan by Board action involved a desegregation plan. The Legislative delay and the recent court order to implement the Board's plan spoke of the issue of desegregation rather than decentralization.

The Legislature clearly could now call for a delay thwarting a previously adopted plan which ORIGINATED with the Board and was viewed as a protection of constitutional rights.

The Court said, on the other hand—the State no longer can say NO—but now the Board is responsible to the Court for a plan with a designated desegregation result.

The balance of power, therefore, shifts from the Creator of the Board: namely the Legislature, to the Board itself in this regard. What is involved is not just an issue of decentralization, but, as important, a process of the shift of power from the influence of the total electorate as represented by the State-wide constituency, to the influence of the local constituency as represented by their Board, and then to Court involvement. It is important to watch in the future—the procedural involvement since the procedural law could be even of more immediate concern than the substantive findings. The Legislature spoke. The Board presented a plan. The Legislature delayed the plan. A new Board will soon be seated but both are now responsible to the Court.

One may make a presentation with some merit that decentralization and desegregation can be explored independent of each

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[1]Bradley v. Milliken, Case No. 20794, U.S.Circuit Court of Appeals Sixth Circuit, October 13, 1970.

other. Decentralization can be planned for purposes of organizational administration and responsiveness to small community units. Another perspective may wish to view decentralization as a projection of a desegregation effort. As Dr. Drachler noted, the changing mobility of the community like Detroit gives rise to certain questions.

How often will the areas have to be changed when one has to foresee that time is needed for the evolvement of an identifiable structure to be formed for each region that is characterized by a viable communication from grass roots to administration and from administration to grass roots?

In other words, if desegregation is paramount in the decentralization effort, then areas or regions will be most temporary and to this extent have to be redrawn so frequently as to fail to formalize an area community.

SUMMARY

In summary, the philosophy of decentralization which suggests greater parental involvement to the extent that schools improve their effectiveness can be accepted without reservation. However, differences will be presented as to the blueprint for such a plan for decentralization. What is clearly needed is enlarged participation by parents. Participating parents who are eager to become informed and who are desirous of making known their position can be most influential in decision making. The courts and all cautious observers of decentralization efforts will watch carefully:

1. The cost of decentralization.

2. The values received.

Finally, let me quote Harold Howe, the former U. S. Commissioner of Education:

> "Local control of education has given us some remarkably fine schools, but it has also given us some very bad ones, and here is where the balance between State responsibility and local control comes in . . . Some states have given local communities too much authority for setting educational standards. The balance between central board control and regional control will be tested in the days ahead."

Summary—Practical Questions Raised from the Detroit Experience.

1. How much will it cost? Exercise in futility?

2. How much support does the decentralization plan have from the:

Legislature	Teachers-Organization
Courts	High School Students
Community	News Media
Parents	

3. Who planned the blueprint?
4. What are the objectives of the decentralization effort?
5. What are the possible areas of litigation?
6. What happens to the ratio of Black and White Students Throughout the School System and Within the Areas? Concerned about the mobility. In 3 years—project—what ratio would be without decentralization.
   Will there be greater integration?
7. What happens to the credibility gap between the school system and certain segments of the community?
8. Is the fiscal responsibility of the central board better understood?
9. Is the educational achievement of minority children raised?
10. Central Board guidelines and regional board rulings will be in conflict.
11. Regional demands not on how the money should be spent—but their allotment of monies.
12. Sharing of power or conflict of power.
13. Does it improve personal and human relationships among all the citizens of Detroit?

CAMPUS UNREST AND THE LAW

By A. Kenneth Pye*

Over the past few years, the attitude of the American people toward campus unrest has escalated from concern to consternation. In September, the President's Commission on Campus Unrest referred to unrest on our college campuses as a "crisis" which "has no parallel in the history of the nation," with "roots in divisions of American society as deep as any since the Civil War." Campus unrest deserves the concern of all Americans, but particularly those who are interested in the legal problems of education.

Historically, college campuses have been centers of social criticism. But, over this past decade, America's colleges and universities have experienced demonstrations, disruptions, and violence of an intensity and frequency unknown to earlier times. The President's Commission refers to the phenomenon as a crisis of violence and a crisis of understanding.

The quality of protests has been quite varied. On some campuses, dissent has been limited to peaceful demonstrations. On others, there have been non-violent disruptions—such as the interruption of classes, speeches, or meetings—or general campus strikes and boycotts. At a number of schools, there has been malicious violence in the form of arson, damage to buildings and furniture, destruction of private property, or personal injury. Campus unrest has also brought a new kind of rhetoric to campuses. Suggestions, reports, and petitions have been replaced on some campuses by "non-negotiable demands"—demands for amnesty to lawbreakers, and threats by highly politicized student groups to halt the normal operations of the university, unless its administration yields.

I do not suggest that all or most students have participated in these forms of protest. Most students are still concerned with obtaining an education (or at least a degree), and many express apathy toward matters unrelated to this end, other than social or athletic activities. Moreover, there is often public misunderstanding of the numbers of students who are involved, and of the nature of protests that are staged. Mass media, for instance, sometimes tend to lump all campus protests—from the peaceful demonstrations to violent, unlawful acts—under the single rubric of "campus unrest," thus combining student protesters who maintain a silent

*Chancellor, Duke University.

vigil in front of a chapel with vandals who burn down a ROTC building. And some representatives of the academic community have been less than helpful when they have classified conduct such as false imprisonment, or the occupation of buildings, as non-violent disruptive protests. The President's Commission has performed a valuable service in distinguishing between unrest and violence.

Campus unrest has been most prevalent in large institutions with highly select student bodies, but it would be a tragic mistake to write it off either as an Ivy League-California phenomenon, or as the product of a small band of revolutionaries who seek the destruction of our basic institutions. I believe that unrest is still spreading, and that many colleges which have been spared until now may have their hour of truth in the not-to-distant future, unless we are able to change the mood of many of our youth.

The causes for this campus unrest, and what we should do about it, have been the subject of a number of learned studies, including the Report of the President's Commission, as well as a great deal of inexpert comment. Most of the studies, thus far, have concentrated on student concerns—"what's bugging the kids," in the campus vernacular. In general, they have found that many students assert serious grievances, some of which have considerable merit.

Some of their complaints, for example, concern the values and priorities of higher education. Students object to impediments in the channels of communication among students, faculty, and administration, to a lack of responsiveness by administrators and faculties, to the impersonality of university life in our very large institutions. They object to their inability to participate in decisions which affect their lives on the campus. Many of them charge their university with hypocrisy, arguing that while the university expresses concern with faculty teaching, it frequently promotes on the basis of faculty research; while the university embraces the ideal of high living standards for all Americans, it provides relatively low wages to non-academic employees; while the university pays lip service to the concept of due process, it refuses students the right to participate or to be represented by a lawyer in disciplinary hearings; and while the university professes to be concerned about social problems of the community, it demolishes low-income housing to expand athletic facilities.

To understand the dissatisfaction among these students, it is

important to recognize that there is a wide cleavage between many faculty and many students concerning the role of the university in American society. Most faculty members adhere to the position that a university should teach and conduct research, and that it should attempt to be neutral in controversial social problems, functioning as an objective truth seeker. They assent to these goals while recognizing that the practical problems of university financing—the increased dependence on government and foundation support, and the significance of investment income and alumni giving, particularly in private schools—inevitably require a conscious concern by university administrators with the state of the stock market and with national priorities.

Many students, on the other hand, not only maintain that universities have become a handmaiden of the military-industrial complex, but they also reject the concept of institutional neutrality as constituting a worthwhile objective. They seek, in the words of Congressman Brock, that the university become "partisans of the progressive forces in society;" and they do not suffer from modesty in presuming to know which forces in society are, in fact, progressive.

These students disagree with perhaps most Americans outside universities concerning the very purpose of a university education. I suspect that most Americans think that universities exist primarily to provide education to students, in order that they will be able to perform the tasks required in a constantly advancing society. In short, universities exist primarily to benefit the society of which they are a part. Many students, however, maintain today that universities exist primarily for students, and some suggest that it is illegitimate to think of higher education as a supplier for the needs of business or the professions, at least at the undergraduate level. Obviously there is some truth in each approach, but the difference in emphasis may become extremely important when a question arises concerning whether a Black Panther should teach a course in race relations, or whether ROTC should be retained in a curriculum.

The young people of our country have great faith in the capacity of all Americans to make decisions which affect their lives. They speak of the university as a community and, at times, their concept of community seems to be akin to that of an Athenian City-state, modified by a one man-one vote requirement in which the university president's office is the 20th Century equivalent of the

Agora. Some believe that janitors should have an equal say with faculty members in determining the policies of the university, and that students should have a voice in the kinds of decisions made in the past by the president or the board of trustees. This egalitarian idea frequently conflicts with the hierarchical nature of universities, and the preferred status of certain faculty members, particularly in universities where there is a clear distinction between tenured faculty and others. It also constitutes a threat to the traditional distribution of power within the university. In the opinion of many faculties and administrators, it would produce anarchy if taken to the extremes which some assert to be proper.

In addition, there are particular problems faced by minority students, many of whom have been taken from second-rate high schools and plunged into a highly competitive university world. There may be little relevance between traditional degree programs and the kinds of things which they think they need to know in order to provide leadership for their people. And there are special problems faced by the predominantly black institutions.

Some of these problems cannot be solved in the near future. We are in a period when universities are reassessing their objectives and modes of operation. The most common panacea suggested is to increase student participation in university governance. It is easy to grant demands for greater participation, if you are reasonably sure that the university will be stronger as a result of new allocations of power; it is much harder, if you think the university will be weaker. It is by no means certain that a high level of student participation in matters such as the appointment, promotion, or retention of faculty will improve the teaching or research capacities of institutions of higher learning.

Some student complaints are capable of solution now. They have not been dealt with, partly because of intransigence and vested interests which should not be permitted to continue to frustrate attempts at change. Universities can and should assume the responsibility of dealing with student complaints about university-related grievances. Society can legitimately expect higher education to do a better job in seeking solutions than it has demonstrated in the past, but the essential point which must be understood is that campus unrest will still exist, even if a satisfactory resolution of these matters is achieved.

Student protests on most campuses are limited to matters of university cognizance. Many college students are equally or more

critical of American society's perception and response to the problems facing it. Many students speak in terms of the "establishment" and include the government, the churches, and the business community as parts of it. The concerns and criticisms of our students are directed to problems of racial discrimination, poverty, the values of materialism, the draft, the quality of environment, the defense budget, and the incapacity of the young to translate their concern into effective political action. There is wide disagreement with the priorities which they claim that the "system" has set for the allocation of societal resources to meet national needs. They simply do not believe that capable men, acting in good faith, would tolerate the conditions which they deplore. They are unwilling to believe that there is a limit to funds or trained manpower available to change the directions in which our society has been proceeding for a quarter of a century. Many seem to believe that history began with the blast at Hiroshima.

Of overriding concern is the war in Vietnam. Our military engagement there is not viewed, by many students, as a legitimate effort to stop the expansion of world Communism; nor do they feel that we are in Southeast Asia for the purpose of protecting the right of freedom-loving people to choose their own form of government. Many students view Vietnam as an example of national aggrandizement in the conduct of our international affairs, in which we are supporting a military dictatorship solely for the purpose of furthering the aims of an imperialistic policy.

Some students, of course, support our national policy. Many, perhaps most, are in the middle; they simply do not know whether we should have gone into Vietnam, but they think we probably ought to get out of Vietnam faster than we are proceeding.

The general concern over the war, and its effect upon the allocation of national resources to meet pressing social needs, created a tinderbox. Our sudden incursion into Cambodia last May, and the outrage over the deaths at Kent State, produced the sparks which flared into unprecedented student responses across the nation.

The most frightening message to many universities from the events of last May was the extent to which campus unrest could be triggered by events in no way connected with their campuses. Tranquility on campuses was jeopardized—no matter how well a university president had been able to achieve rapport with his student body; regardless of the channels of communication that

had been erected; despite the responsiveness of the institution to the perceived needs of the students. The solutions to internal problems had little effect on the kinds of general protests that emerged as a result of external actions beyond the control of the university. No university was consulted before the United States went into Cambodia; no university was consulted by the Ohio National Guard. Yet these events were capable of producing a nation-wide student solidarity that reflected itself in protests ranging from peaceful demonstrations to felonies in many institutions across the country.

I do not want to be misunderstood—I am not trying to shift the responsibility for campus unrest to the federal government and, as I shall indicate in my subsequent remarks, I accept President Nixon's and Professor Sidney Hooke's argument that there can be no substitute for the acceptance of responsibility for order and discipline on college campuses by college administrators and college faculty. My point is that the assumption of this responsibility may reduce violence, but it will not dissipate unrest, because some of the causes for this unrest are outside of the cognizance of universities. The President's Commission clearly indicated that they realize the true issues in calling for leadership from the President, and tolerance by the students, in solving these great problems which face the Republic.

In cataloging student grievances about the university and society, I have deliberately refrained from referring to them as *causes* of student unrest. I appreciate that it is fashionable to assume that an expressed *grievance* and a *cause* are the same things, but frequently they are quite different. We have abundant instances of a disturbance which erupts, followed by the assertion of grievances which bear little relation to the reasons for the disturbance. The structure of American higher education is quite different from that in most countries in the world, and our social problems are also different. Yet student unrest is not confined to the United States. In France, Italy, Germany, South America, Japan, and even in Red China, we have experienced similar unrest during the decade, with greater intensity than ever before.

The President's Commission seems to attribute campus unrest to the "new culture" emerging among students, and their growing lack of tolerance to others who are apathetic and disagree; but this approach is likewise more descriptive of the malaise than the cause. Frankly, I do not know the causes of the student unrest, and I am suspect of people who claim they do. One of our prob-

lems is the obvious difficulty of finding a cure for the disease when we are not yet sure of its cause.

For our purposes, however, it may not be necessary to know the exact underlying causes with precision. It may be enough if we appreciate the relationship between campus unrest and the concept of authority in society.

Students are dissatisfied with the manner in which those in authority are dealing with problems, the solutions to which they think are self-evident. Student unrest, whether peaceful or violent, lawful or unlawful, basically reflects a loss of confidence in the capacity and/or motivation of those in authority. This loss of confidence is not confined to campus authority; it extends to government, the church, and business. Neither is this loss of confidence a monopoly of students; it simply is more prevalent within their ranks. The student demand to participate to a greater extent in educational policy and administration reflects this loss of confidence in those who are exercising authority within the university, and is an assertion of their belief that they can deal more effectively in these areas.

Any challenge to authority in society has long-range consequences to the law, because the law embodies the concept of authority and the obligation of obedience to its dictates. But the legal order has been faced with challenges to authority before, and has dealt with these challenges successfully. If we were involved with only a peaceful, lawful challenge to authority, whether in the form of campus or civil authority, few problems would be raised for law enforcement in practice.

Frequently, however, the challenge to authority on the campus is in the form of unlawful activities—unlawful either under civil law, or unlawful under university disciplinary rules. Open violation of law, seemingly tolerated by those in authority, whether on or off the campus, involves a much more serious problem. In addition, the campus unrest of the last few years has produced a novel theory that any use of force to prevent violations of law, or to arrest lawbreakers, is basically invalid, if those who have violated the law have behaved in a non-violent manner. In short, the use of force to enforce law is *per se* invalid if applied to non-violent lawbreakers. I regret that there is considerable support for this doctrine on college campuses. We see it expressed in the student solidarity which results from the use of force to carry away

demonstrators who are blocking a road, or who are sitting on a building, and in demands that campus police be unarmed.

Law enforcement also has a particular interest when student protest is accompanied by the assertion that civil authority cannot be legitimately extended to the campus. This assertion is usually the basis for demands that police not be called to a campus. This medieval concept of "benefit of clergy" or "sanctuary" on the university campus, poses a threat to the very structure of our legal system, for if members of a university community can ignore the law on the campus, it is difficult to argue that the same privilege should be unavailable to other groups in society who confine their unlawful activities to non-public areas.

It is this crisis of authority which seems to me to be the focal point of the law's concern with campus unrest. The basic question is how the challenge should be met.

In recent months, there have been a number of simplistic solutions. University presidents are told that they should "throw out the lawbreakers," or even those who are not breaking the law, but who are "obstructionists." Sometimes these assertions are not unlike the demands of the Central Committee of a Communist party that revisionists be expelled. Police and prosecutors are urged to provide prompt and effective law enforcement which, translated, may mean the use of as much force as is necessary to quell any unlawful activity, without regard to the consequences of such action. In the language of the Philippine insurrection, the police are told to civilize them with a Krag.

Of course, there are occasions when students should be expelled, and there are occasions when police should be utilized for maintaining or restoring order. There have been occasions when patience may have exceeded the bounds of sound judgment. But let us never oversimplify our situation. The problems facing us are too sophisticated to ignore the importance of discretion in choosing proper courses of action in different circumstances.

Most students on our campus do not engage in unlawful activities: they believe that the American way of life is a pretty decent way to live, and that authorities are, by and large, devoting their best efforts to improving our society. These students, however, are considered by some of their more radical colleagues as being apathetic or simply "uneducated."

The proponents of campus disorder strongly desire to radicalize or otherwise mobilize these "inactive" students. The principal

tactic of mobilization is to encourage over reaction by those in authority, thus demonstrating the inflexibility of the "system"—its unwillingness to change, and its ruthlessness in dealing with dissent. Any person in authority, whether he is a university president, a chief of police, or a prosecutor, must be mindful that his response to the challenge requires that he think first of its impact on the uncommitted mass of students. In the words of an authority on protest demonstrations, Sol Alinsky, "Never take an action without considering the reaction." If our actions demonstrate justice, fairness, and competency, as well as authority, we will be well on our way to winning the steadfast confidence of the great majority of students.

We have seen examples where a delay in calling police may have encouraged disrupters to engage in more flagrant conduct. We have seen cases where inaction or undue leniency toward lawbreakers may have destroyed the deterrent effect of punishment and, by so doing, may have encouraged additional misconduct. We have also seen cases where the intervention of police in large numbers achieved very little in the way of restoration of order, but achieved a great deal in "turning on" previously uncommitted students. Those in authority, whether on or off the campus, must be granted the discretion to call the shots as they see them. I do not agree with the recommendation of the President's Commission that when "criminal violence occurs on the campus, university officials should promptly call for the assistance of law enforcement agencies," if this means the immediate introduction of substantial police onto the campus in all cases of violence.

Frequently, the issue will be posed in terms of whether the immediate restoration of order is worth "the risk of broadening the support for the radical movement, polarizing campus opinion, and radicalizing previously uninvolved persons." The practicalities of the situation will often pose a dilemma. In such a situation, it is well to remember the adage provided to us by Mr. Robert Townsend in his recent book, *Up the Organization:* "The Charge of the Light Brigade was ordered by an officer who was not on the field."

Where a university administrator is confronted with campus unrest, he will normally have a number of alternatives. In the first place, he can do nothing. Sometimes this is the only course of action which he should follow, since many of the most annoying disruptions will involve activity protected by the First Amend-

ment—activity which neither violates any university rule nor any law.

Sometimes, prudence dictates that no action should be taken even when confronted by conduct which does violate a university rule, or even a law. These occasions may be few, but they exist. Thus, when a group of students block a road as a symbolic gesture of sympathy to students killed at Kent State, wisdom may dictate that they neither be arrested by local police, nor that they be subjected to university disciplinary procedures, if the duration of their misconduct is short, and the motivation of their behavior is clear.

In most cases on the campus, as in society as a whole, a violation of law requires a response designed to prevent further disruption and to impose a sanction upon those who have transgressed. This response does not always require that the university should call upon the city or state to invoke formal criminal processes. Universities should have at their disposal a number of internal techniques to deal with campus unrest. Every university should have a Code of Conduct specifically prohibiting various types of disruptions and setting forth penalties for violations. Every university should have a Code of Procedure which establishes tribunals to try alleged violations of the substantive code. Most institutions have some kind of substantive rules, but many do not have provisions designed to deal specifically with the kinds of misconduct now being committed. Furthermore, either the vagueness of the substantive provision, or inadequacies of procedural due process within the university judicial system, may invalidate any effective use of these internal disciplinary procedures if subjected to judicial review. There is an urgent need that universities examine and redraft their substantive and procedural rules, in order to be prepared for a disruption

The tendency of courts to review expulsions with a fine-toothed comb, honed on criminal cases of the last decade, emphasizes the need for well-drafted codes.

In my judgment, every university ought to have a specific provision for interim suspension within its arsenal of techniques. Some of our campuses have experienced deliberate attempts to frustrate university disciplinary proceedings by the interruption of hearings, threats to witnesses, and even violence. In cases in which a student's continued presence on the campus constitutes an im-

mediate threat of injury to the well-being or property of members of the university community, or to the property or functions of the university, the appropriate university administrator should have the right to suspend the student, subject to a prompt hearing of charges against him. The student may thereby be suspended until a hearing is conducted; he is not free to continue his activities on campus until he has been found innocent or guilty following a hearing. The difference may be crucial to internal attempts to maintain order.

Naturally, there are circumstances in which the intervention of civil authorities will be required. This intervention may take several different forms: the issuance of an injunction; selective arrests; the introduction of substantial numbers of police on the campus; civil suits for damages. All have advantages and disadvantages.

Recently, there seems to have been a trend toward the use of injunctive relief. Apparently, Professor Hook, whose article was distributed by President Nixon to college presidents across the country, believes that a university should routinely seek injunctive relief when "a situation acquires a gravity beyond the power" of a university to cope with it. I view such an approach as naive, to say the least.

It is frequently necessary to utilize local law enforcement officers to serve process. In most states, the injunction is not self-enforcing, although at least one state statute makes a violation of an injunction a crime in itself. There may be practical problems of providing notice required by statute or the Constitution before an ex parte restraining order can be obtained. Enforcement of an injunction through court proceedings may involve some of the same problems as those presented when police are used to quell a disturbance. A university that is not prepared to enforce the injunction through contempt proceedings should not seek one. To obtain an injunction in such a situation might permit a court decree to be flouted by students with impunity.

There may be significant procedural problems involved in establishing proof of notice of the injunction when the defendant is brought before the court in contempt hearings. There may be substantial problems of identification when large numbers of students are involved. Where the evidence is insufficient, there is a possibility that an acquittal may have the effect of re-enforcing the status of the offenders within the campus community. An im-

providently secured injunction may have the effect of polarizing resistance to university discipline. Improper resort to the injunction for the purposes of restraining the exercise of First Amendment freedoms may result in lower court denials or appellate court reversals embarrassing to the university, and may contribute to the arguments of dissidents that the university does not respect basic constitutional rights.

In determining whether to seek injunctive relief, a university may wish to consider other factors as well. Violation of an injunction may be punishable even in circumstances where the injunction should not have been granted, but enforcement of the sanction of contempt in such a case may, in practice, contribute to a disrespect for the law. Indiscriminate use of injunctions may encourage disruptions, if students conclude that they can engage in disruptive activity without fear of arrest or university disciplinary proceedings, as long as they are prepared to yield to a court order when the university seeks injunctive relief. Certainly no institution should depend upon the injunctive relief as a routine teachnique for maintaining order.

University security forces are small. In many universities they are poorly trained and poorly equipped, even if compared with local police departments. A university security force will simply be unable to maintain or restore order in a disturbance of substantial magnitude. Professor Hook suggests that the first line of defense should be faculty and student marshals, armed with cameras and empowered by the academic community to maintain order. Student and faculty marshals may prove useful as monitors of a march, or in dissuading some students from joining the ranks of the disrupters. I shudder to consider their impact in a situation like we have experienced at Columbia, San Francisco State, or Wisconsin, and am not sanguine that we could master the recruitment problems even if I agreed with Professor Hook concerning the feasibility of using untrained scholars and students as a "first line of defense."

It does not follow, however, that it is always necessary or wise for large numbers of police to come on campus to try to do what the academic community cannot accomplish. In many cases, the local police force may also be too small or ineffective to deal with the disruption effectively. Many disturbances reach a peak fairly quickly, and then subside fairly rapidly, particularly if the weather is bad. In such cases it may be better practice to wait until the

disruption subsides, if there is not an eminent threat of danger to persons or property, take photographs with a long-range camera, and then arrest, on an individual basis, previously identified suspects. There has been too little use of the technique of selective arrests after the disturbance has subsided.

In some circumstances there will be a need to introduce a substantial number of police on the campus to stop or prevent an unlawful activity, as in the cases of violence, or eminent threats of violence, when the university is unable itself to maintain or restore order. The use of large numbers of police on campus to restore order carries with it an inevitable threat of provocation by radical students, followed by over reaction from inexperienced police. This is a risk that sometimes must be accepted. It is not necessary, however, to increase the risks by a failure to plan. Pre-disturbance planning to coordinate efforts of campus authorities and the local police, in the event that they will be required to act together to deal with a disruption, is a necessity. The history of police intervention on campus during recent years has given us a clear indication of how little planning and coordination has sometimes been done before an emergency has occurred. This is no more the fault of the police than it is of the university. It is not important to assess blame for the past; we must try to prevent similar problems from arising in the future.

I do not wish to leave you with the impression that I have all the answers; I don't, and do not pretend to. No one comes out of one of these confrontations successfully without luck, and no one has an approved school solution of universal validity. Hopefully, everything I have said here will be irrelevant within a few years. During the interval, I hope my comments will be of some assistance in understanding the crisis which we are now facing.

CURRENT LEGAL PROBLEMS IN CHURCH-STATE RELATIONS AND THE SCHOOLS

By Donald E. Boles*

As anyone remotely familiar with political theory knows, the battle over the separation between church and state as it affects temporal affairs was old at least by medieval times. Pope Boniface the VIII as early as 1302 in his famous Unam Sanctum explained the problem as follows:

> We are told by the word of the gospel that in this His fold there are two swords, a spiritual, namely, and a temporal . . . the one, indeed, to be wielded . . . by the hand of the priest, the other by the hand of the kings and knights. . . .

The practical political problem from that time to this, however, is where does the spiritual authority end and where does the temporal authority begin. The historic clashes of early modern times through the most recent debates in the American political arena have been essentially over this precise problem.

The United States is unique among the constitutional democracies of the world in that its Constitution contains *two* clauses on religion. The First Amendment, as is well known, provides that Congress shall pass no law respecting an establishment of religion nor any law prohibiting the free exercise of religion. Many nations have protections in their constitutions guaranteeing freedom of religion: the constitution of Burma, for example, as well as that of Great Britain, and the Scandinavian countries are typical of such constitutional documents which provide for freedom of religion. But these constitutions do not insure protection against an established religion and in these and in many other nations a single established church is the common religious structure.

One of the subtler yet more devastating dilemmas facing the American courts today is the potential conflict between the establishment of religion clause and the freedom of religion clause. Certainly with but a few notable exceptions the Justices of the United States Supreme Court have been generally oblivious to this dis-

*Professor of Political Science, Iowa State University.

tinction.[1] Needless to say it is common for us to point out that since we have a Bill of Rights which provides a variety of rights, no *one* right can be absolute. Of course, an obvious exception to this doctrinal concept lies in the person of Justice Hugo Black of the Supreme Court insofar as his belief in the absolutes of the freedom of speech is concerned. It does, however, seem peculiar that more emphasis has not been placed upon the potential for conflict between the two religion clauses.

In these days of legal lance-tilting over the public schools, it might not be facetious to suggest that public school superintendents and principals be required to have a law degree as well as their normal professional degrees. A variety of reasons lie behind the proliferation of litigation of a civil liberties nature affecting the public schools.

An important development has been an enormous increase in federal funds for elementary and secondary education under the Elementary and Secondary Education Act of 1965. A portion of these funds may be allocated to private and parochial schools. Questions emerging from the allocation of limited financial resources as well as those concerning the classic concepts of separation between church and state raise a plethora of potential issues for litigation.

A second reason for the litigation syndrome in which the Supreme Court and the schools find themselves is that the Supreme Court has taken upon itself the role of the nation's school board, not only in the area of church-state relations but in other civil liberties areas as well.[2] Unfortunately, in many cases the role was foisted upon the court by the public education system itself through its refusal to recognize archaic, and frequently silly procedures concerning non-school-related activities, discipline, dress,

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[1]See for example: Donald E. Boles, *The Two Swords.* Ames, Iowa, Iowa State University Press. 1967; Boles, *The Bible, Religion and the Public Schools,* 3rd edition. Ames, Iowa, Iowa State University Press. 1965; Boles, "Problems Encountered in the Administration of Staff," Chapter 6 in *Law and the School Superintendent,* edited by Chester Nolte. Cincinnati, Anderson Publishing Co. 1970. For an example of the Supreme Court's handling of the problem, see Brennan's majority opinion in *Sherbert v. Verner,* 83 S. Ct. 1790 (1963), and Harlan's concurrence in *Walz v. New York City Tax Commission,* 90 S. Ct. 1409 (1970).

[2]One federal district court judge has concluded that one's belief in nudism cannot prevent him from becoming a policeman.

Job application by John J. Bruns, III, a 30-year-old nudist, which was rejected by Baltimore 14 months ago, was overturned by Chief Judge Edward Northrop, who ordered that Bruns be placed on the police force as a probationary officer. In the judge's view, the decision not to hire Bruns, the top applicant, stemmed merely from his membership in a nudist colony. Such arbitrary and capricious administrative action in refusing to hire him on this basis violated Bruns' constitutional rights of free association.

length of hair and similar matters that violate the most elemental principles of the Due Process and Equal Protection Clause of the Fourteenth Amendment.[3] The *Tinker* case,[4] involving the peaceable and non-disruptive wearing of black armbands is but one of the more recent and obvious cases in point.

The school administrator's problems in these areas and notably the field of church-state separation are complicated still further, of course, by the fact that he must not only be familiar with a rapidly evolving and changing body of law but in addition he must keep his classroom teachers apprised of these developments and attempt to insure that they follow practices consistent with law and judicial decisions. If a classroom teacher unilaterally chooses to engage in a practice which is forbidden by Supreme Court decree it is the school administrator and board upon whom the legal responsibility and public censure descends.[5] That this is more than a hypothetical problem is illustrated by the reply of one Iowa school administrator to a questionnaire of the Iowa Civil Liberties Union seeking to ascertain actual practices of a religiously oriented nature followed in Iowa public schools. The superintendent indicated that the school policy, in conformity with the decision of the United States Supreme Court, prohibits prayers and Bible reading in the public schools, but he concluded it was diffi-

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[3]For recent cases, see: *Jackson v. Dorrier*, 425 F.2d 213 (1970) in which the Supreme Court denied certiorari; and *Breen v. Kahl*, 419 F.2d 1034 (1969), cert. den. 26 L. Ed. 2d 268 (1970). For scholarly interest it is significant to note that the Breen case turned on the question of whether the wearing of long hair was an expression of symbolic or general expression of opinion, as contrasted to the Jackson case, where the fact situation involved a contractual arrangement between a so-called "rock" group and others. In Jackson the court held that the economic rights or due process property provisions were not infringed by the administrative regulation limiting a student's length of hair. For discussion of this case, see *Des Moines Register*, October 13, 1970.

Other cases are *Crew v. Cloncs*, 7th Circuit Court of Appeals, 1970; *Farrell v. Dallas Independent School District*, 392 F.2d 697 (1968), in which a lower federal court did uphold a regulation limiting length of hair, on grounds that under certain circumstances it could become a disruptive influence in the school.

The question which faces the Supreme Court is whether the Breen case involving a question of expression, and the Jackson case, involving contractual arrangements, constitutes a conflict in circuits. Procedurally this raises the issue of whether a certified question is in order or constitutional issues of entirely different natures are involved in the so-called "contract" problems of Jackson versus the freedom of expression problems inherent in Breen.

[4]*Tinker v. Des Moines Independent School District*, 89 S.Ct. 733 (1969).

[5]The authority of a teacher or school board to mandatorily cut a student's hair, which, in the teacher's judgment, is too long, is subject to notable restrictions by the courts. For example, Mario Montes, age 12, has been awarded $2000 in damages from the Mecca School District because his teacher, Isabel Osborne, cut his long hair in the classroom. The boy's attorney argued that Montes suffered emotionally from the "mohawk-type haircut" and had been despondent since that time. The complaint filed in Superior Court of California originally asked for $50,000 damages, and settlement was reached out of court. *Des Moines Register*, October 23, 1970.

cult to determine how many prayers were "smuggled into the classroom."[6]

For example, the Supreme Court, which started its fall term on October 5th, has under consideration what may be regarded as the determinations concerning the future of Roman Catholic Parochial Schools in the United States. The schools now enroll 4.8 million pupils and operating costs are estimated at 1.7 billion dollars a year.[7] Other cases before the Warren Burger Court, as well as cases presently being litigated by the lower federal and state courts, will probably decide the constitutionality of many aspects of public aid to private schools which are being challenged under the legal grounds that they violate the traditional American principle of separation of church and state.[8]

One of the most complicating problems in this general area is the relative lack of concern with the basic fact that we are, in point, faced with fundamental relationships of public schools to parochial schools as well as the use of the public funds for private schools. Only recently have the realities inherent in these knotty and fundamental questions been faced by educators, lawyers and policymakers. The arguments may now be removed from the rather sterile legal arena so as to include questions involving the very practical economic and social effects of these programs intent on providing public funds for private schools.

For example, there is little question that parochial schools are in, and have been in, a financial crisis.[9] In this connection, however, they differ little from the financial woes faced by many public school districts in the United States although the reasons for the problems may, in some instances, be rather different. Rejection of school bond proposals as a result of the so-called taxpayers' revolt or drives to restrict and limit cost-of-living increases for public school teachers are merely some of the more obvious

[6]See: Boles, *The Bible, Religion, and the Public Schools*, 3rd edition, Ames, Iowa State University Press. 1965, pp. 288-292; Pfeffer, *Church, State, and Freedom*, Boston, Beacon Press. 1967, p. 478. See also Staff Report to the Senate Subcommittee on Constitutional Rights, Part II, July-October 1970, p. 6, for a summary of recent Senate action on the Baker Amendment, known popularly as the "prayer amendment," since its intention is to overrule *Engle v. Vitale*, 370 U.S. 421 (1962) and *Abington School District v. Schempp*, 374 U.S. 203 (1963).

[7]*The Christian Science Monitor*, October 3, 1970, p. 11; *U.S. News and World Report*, August 31, 1970, pp. 56-61.

[8]See for example, *The Des Moines Register*, October 5, 1970, p. 8, referring to cases from both Pennsylvania and Connecticut facing the court this term.

[9]See for example, "Catholic Religious Order Files for Bankruptcy," *Des Moines Register*, November 5, 1970, in which the Salvatorian Order, a Roman Catholic religious order, has sued for bankruptcy. On October 12, the Supreme Court refused to hear an appeal on the case from a federal district court of Wisconsin.

financial problems faced by the public schools and certainly affect their relations as much as the absence of public funds directed to parochial schools would, and does, affect the functions of the parochial school.

A 1966 survey published by the Notre Dame Press showed parochial schools turning away hundreds for the lack of funds.[10] A follow-up survey in May 1970 brought the forecast that the church's elementary schools enrolling 2 million, or half the national parochial school total, would close in the next six years unless new funds were forthcoming. The National Catholic Education Association forecasted more schools closing and this fact is borne out by restriction of parochial school operations in such diverse places as Iowa,[11] Cincinnati diocese and elsewhere in the United States. It is important to note, however, that a significant number of Roman Catholic school administrators, teachers and people well informed on problems of educational administration are, in many instances, of the opinion that it is to the b interest of the students that, in some of these cases, the schools be closed because of the rather questionable quality of the education which the particular school may be able to provide.

As one looks at figures compiled from a variety of sources, one rather startling fact emerges concerning the closing or restricting of parochial education in this country. The fact is, there have been more schools closing since the passage of the Elementary and Secondary Education Act which has in it a proviso which will permit, at this juncture, the use of public funds under certain circumstances to parochial and private schools if the state laws and state constitutions will permit. It should be emphasized, of course, one of the main questions before the Supreme Court, in its October term, in the case of *Lemon v. Kurtzman*[12] is the key issue of whether or not this permissive language in the Elementary and Secondary Education Act is, in fact, a violation of the First Amendment's Establishment of Religion clause and possibly the Freedom of Religion clause. So this question, regardless of what we may say now, is soon to be decided and may, in fact, be decided almost any day depending on the court's activity in conference.

But to return to the point that more parochial schools have closed and more continue to close since the passage of the Elemen-

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[10] *Op. cit.*, p. 8.
[11] *The Des Moines Register*, October 22, 1970, p. 16.
[12] Appellate docket number 1189, from the U.S. District Court, Eastern District of Pennsylvania.

tary and Secondary Education Act, Dr. Francesco Cordasco, member of the Newark, New Jersey Archdiocese and Board of Education, provided these figures concerning parochial school closings at the National Catholic Educational Society Convention.

1966-67	50 Elementary schools closed.
1967-68	152 Elementary schools closed.
1968-69	225 Elementary schools closed.
1969-present	301 Elementary and secondary schools have closed or are in the process of closing.

Enrollment in Catholic secondary and elementary schools has dropped from 5.6 million in the 1964-65 school year to an estimated 4.86 million in the current school year (1969-70)—"a decline of ¾ of a million of students in only five years," said Dr. Cordasco quoting the National Catholic Educational Association.[13]

According to a report of the Center of Urban Redevelopment in Education, there will be no parochial elementary schools left in Brooklyn and Queens, New York within five years unless larger financial contributions are forthcoming.[14] Throughout the United States it is clear that various pressure groups have proliferated and have increased their activities directed at the state administrators and state policymakers in order to obtain increased aid to parochial schools. The result as previously noted and as obviously expected has been a series of taxpayers' suits brought against state governments whose statutes do permit or require aid to private and parochial schools and these in turn are now being tested at both lower court, state and federal and at the United States Supreme Court level.

Staffing Problems in the Schools

The economic consequences affecting taxpayers generally from either the filtering off of public funds to private schools or enlarging the public schools to contain adequate facilities to meet their present enrollment plus such additional parochial school enrollment shifting to public schools are matters of major debate. One school of thought has argued that the public schools are inadequate as presently established to meet the present enrollments let alone add to their numbers parochial school students from schools that have been closed for financial reasons.

[13] *Christian Science Monitor*, Saturday, October 3, 1970.
[14] *New York Times*, April 24, 1970.

On the other side it is equally strongly argued by organizations such as the various state associations of school administrators that wherever faced by problems in which the parochial schools in an area have closed down the public schools have been able to absorb the parochial school students with little or no discomfiture to either pupils, staff or administrators. A situation of this nature occurred several years ago in the St. Louis area where there was a threat to flood the public schools with parochial school students and after several days in which this was carried out it became perfectly clear that the public schools, with some minor inconvenience in adjustment, were in fact quite capable of handling these students from parochial schools. This tactic of the various groups pushing it as a device to pressure the policymakers of the city and state was given up and the students shortly returned to the parochial schools.

Certainly one of the problems which confronts the parochial schools and explains why they are in economic difficulty is the notable decrease in religious teachers who receive modest stipends and contrary-wise the increase in the number of lay teachers teaching in parochial schools, who by the nature of things, insist upon larger salaries to meet their living expenses.

As I have had an occasion to point out in several of my books[15] and as many others have noted,[16] the Supreme Court has been faced with problems of this nature in a variety of decisions over the years involving not only parochial and private schools but the public schools as well. The emotional quality of the briefs and of the issues emerging in these cases has seldom been duplicated. No attempt will be made at this juncture to review the judicial history of the various and sundry problems of this nature which the court has either confronted or conveniently ducked. It must be noted, however, that in 1968 in the *Allen* case it did uphold a New York law providing public funds for text books "loaned" to the parochial school pupils.[17] In some respects the case of *Flast v. Cohen*[18] of the same year was of more importance. The significance of the *Flast* case was far more broad in procedural scope since it clearly established for the first time that the court

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[15]See Boles, *The Bible, Religion, and the Public Schools*, 3rd edition. Ames, Iowa State University Press. 1965; and Boles, The *Two Swords*. Ames, Iowa State University Press. 1967.

[16]Pfeffer, Leo, *Church, State and Freedom*. Boston, Beacon Press. 1967. For a quite recent view of this point and contiguous matters, see Robert Michaelsen, *Piety in the Public School*, New York, MacMillan. 1970.

[17]*Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923 (1968).

[18]*Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942 (1968).

would accept jurisdiction in cases in which the Establishment clause of the First Amendment to the United States Constitution was at issue and which litigation almost by the nature of things was forced to take on the quality of a taxpayer's suit. Prior to that time in a series of cases there had emerged what is usually referred to as the *Frothingham* rule.[19] There the court had since 1920's held that it would not accept taxpayers' suits against the expenditure of federal funds for federally sponsored programs. This rule had the practical result of effectively making it an impossibility to attack federal grant-in-aid programs. The *Flast* case which will be discussed later makes it clear, at a minimum, that this first clause of the First Amendment—the Establishment clause —may in fact be litigated and certain federal programs such as the Elementary and Secondary Education Act of 1965 are not totally immune from judicial scrutiny or judicial review because of the so-called "Frothingham rule."

As this is being written the Supreme Court has agreed to hear a challenge of Pennsylvania's 1968 program which allows funds for teacher's salaries, textbooks and instructional materials for nonsectarian studies in parochial schools below the college level. The program is financed by the racetrack admission taxes.[20] In addition to the *Lemon* case the court will also hear a case from Connecticut involving Roman Catholic colleges. The law of the state authorizing grants "to institutions of higher education" of federal funds for and construction of academic facilities is challenged by the American Civil Liberties Union and the American Jewish Congress after a sectarian college was granted such aid.[21]

The most far-reaching decision at the present time insofar as utilization of public funds for parochial schools was the 1968 *Allen* decision just mentioned. This decision, the New York Times noted, "deepened the already serious inroads that have been made into the vital principles of church-state separation." Needless to say a spokesman for the financially hard-pressed parochial schools hailed the decision. At least one estimate suggests more than 20 state legislatures have voted to aid parochial schools by one means or another.[22]

This emotion-riddled issue is also a burning political question. For example, the Michigan Supreme Court in October upheld a

[19] *Frothingham v. Mellon*, 262 U.S. 447 (1927).
[20] *Lemon v. Kurtzman*, Docket No. 1189, October Term 1969.
[21] See for example: *The Christian Science Monitor*, October 3, 1970, p. 11; *Tilton v. Richardson*, Docket No. 1555, October Term 1969.
[22] *Christian Science Monitor*, October 3, 1970.

program permitting the use of public funds under the Elementary and Secondary Education Act to parochial schools.[23] The state legislature, however, has scheduled a state-wide referendum for November 3rd on a new aid plan which continues the controversy over the general principles of public funds for parochial schools. President Kennedy, for example, rejected pleas from fellow Roman Catholics for federal aid announcing that he and his staff considered it unconstitutional.

Under strong pressure President Nixon has named a panel of which half are Roman Catholics to examine the parochial school crisis. Nonpublic schools are about 87% Roman Catholic in this country although in some states such as Wisconsin at various times Lutheran schools, in fact, outnumbered Roman Catholic parochial schools. Absorption of these pupils into the public schools, Mr. Nixon estimates, would cost about $4 billion annually.[24] Now it should be emphasized that these are figures which are disputed by a whole host of public school organizations and associations concerned with the preservation of our public school system.[25]

One study by Dr. Cordasco, who is generally favorably inclined toward such programs utilizing public funds for parochial schools estimates that Detroit has paid around 90 million dollars in the past four years to accommodate former parochial school pupils in the public school. Historically he argues, "the improvised urban Irish Community created a community school system to serve its children and that its motivation was political and social," only incidentally religious.[26] "The Catholic Church in America," Dr. Cordasco wrote, "was (and is) in essence, an Irish church, and that other Catholic ethnic communities entertained a subordinate relationship to the Irish dominance and power."[27]

There are others who have argued equally as strenuously that the parochial school system was created in the middle of the nineteenth century because of the heavy Protestant emphasis in the

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[23] *Wall Street Journal*, January 22, 1969, p. 187; *Christian Science Monitor*, October 14, 1970.

[24] *Christian Science Monitor*, October 5, 1970.

[25] See for example: American Association of School Administrators, American Vocational Association, Association for Supervision and Curriculum Development, Horace Mann League, National Association of Elementary School Principals, National Education Association, National School Boards Association, and Rural Education Association, as participants in an amici curiae brief in the case of *Lemon v. Kurtzman*, docket 1189, October Term, 1970.

[26] *Ibid.*

[27] *Christian Science Monitor*, October 3, 1970.

public schools through a variety of direct and indirect practices that were taken for granted and followed on a *pro forma* basis.[28]

In the last several decades, moreover, the Supreme Court has taken a vigorous role in striking down many of the programs that constitute badges and implements of Protestantism in the public schools such as Bible reading, prayers and the like. It might be thus argued that the primary reason for being of parochial schools no longer exists.

PTA Policy of Public Funds for Public Schools

As might well be expected a substantially different point of view regarding the utilization of public funds has been put forward by a variety of other organizations such as the National Council of Parents and Teachers. As early as July 1, 1970, Mrs. Edward F. Ryan, National Chairman for Legislation, directed a memorandum to the National Board of Managers, State Chairman for Legislation, regarding the PTA's policy of public funds for public schools. It explained that "Next Year, 1970-71, may well prove to be a critical year in determining the issue of public funds for public schools only. The following statement is a reaffirmation of long-held PTA policy, and may be used in any way you wish."

> The National PTA believes that a strong public school system which provides excellent educational opportunity to all children is essential to maintaining the strength of our democracy. This responsibility can be met only through the open doors of the public schools. In our view, therefore, money drawn from all citizens according to their economic ability, in taxes, should go only to schools open equally to the children of all citizens, and governed by the representatives of all citizens in the public school boards.
>
> PTA policy is not critical of independent or parochial schools. Such schools serve a variety of good purposes, and many of us throughout PTA utilize them for our own children for special reasons. Public schools, however, are governed in the public interest and for the good of all children, by public policy and regulations. Public funds going to nonpublic schools would be used to serve selected purposes for a restricted enrollment.
>
> Again if tax support were to go to both public and nonpublic schools, nonpublic schools would be strengthened beyond the public schools and could compete broadly for both teachers and students. One of the chief educational virtues of the public schools is that the student body is representative of our society. If nonpublic schools were enabled to draw heavily upon public school students in a selective fashion, both equal educational

[28]See for example: Boles, *The Bible, Religion, and the Public Schools*, 3rd edition. Ames, Iowa State University Press. 1965, pp. 1-36; Pfeffer, *Church State and Freedom*. Boston, Beacon Press. 1967, p. 342.

opportunity and education for democracy would be impaired. Moreover, a competitive system of nonpublic schools frequently weakens local interest in and support of public schools. Therefore support of nonpublic schools is not an appropriate saving of public funds.

It is our obligation as citizens, rather, to concentrate our efforts in financial support of the public schools, and for the welfare of our democratic society strive to make public education excellent for all children.

At approximately the same time in a memorandum dated only 1970, Carol Kimmel, who is listed as a member of the Special Committee on Legislative programs, submitted a memorandum titled the "National Congress of Parents and Teachers Position Paper on Public Funds for Public Schools." This paper pointed out the position of the National PTA has always been quite clear as it relates to funds for the public school. "As early as 1905 the PTA supported federal aid to education. Until 1945 it seemed to have been taken for granted that this meant funds for public schools only." In 1945, however, the explicit statement was proposed:

We believe that any such funds to help states provide adequate educational opportunities for all children and youth appropriated by the federal government should go to public tax supported schools only.

The memorandum continues by noting that again in 1966 the National Chairman of legislation stated to the Chairman of the Senate Committee on the Judiciary:

The National Congress of Parents and Teachers several years ago adopted by action of its state branches a policy in support of federal aid to education, within certain limitations. Chief of these limitations is our long established policy that appropriations of public funds for education should be supported only for publicly controlled, tax-supported schools.

The efforts of the President and the Congress to equalize and improve educational opportunity in our country cannot help but command our sympathy and admiration. We also fully approve the maintenance of private resources. Nevertheless we continue to suggest most urgently that public subsidy of non-public schools will over a period of time seriously weaken the public schools, which we deeply and firmly believe are the mainstay of our democratic society.

This memorandum continues by noting that in 1970 the NCPT legislative programs still states:

In order that the free public school system be maintained and strengthened, federal funds for education must be appropriated only for publicly controlled, tax-supported schools. States should be encouraged to give their best support to equalizing educational opportunities and services within their own boundaries.

In the memorandum Carol Kimmel noted, in addition, that the appropriation of public funds to nonpublic schools, however, has become a reality in some states and is a focus of a bitter battle in others. The national PTA urges the state branches to become actively involved in this struggle.[29] Our conviction remains that the best interest of the children of the nation will not be served by making public funds available to nonpublic schools.[30] The first and greatest task imposed on our schools was to provide an enlightened citizenry in order that self-government could be accomplished and maintained. The second great task has been the creation of national unity. The tendency toward divisiveness in the nation today is so great as to threaten this unity. Yet because of the great press for financial support of the schools, some people feel that it might be wiser to aid the nonpublic schools than to risk their closing and these children being added to the rolls of the public schools. "Some basic issues, however, must be considered," this memorandum points out. First "public schools must receive much greater financial support. If funds for non-public schools come from the same source this is a danger to the financing of the public schools." Second, "at the present time public schools have not been able to provide equality of educational opportunity and it does not seem to be readily attainable. Across-the-board funding, as done by most states, does not meet this need. Disproportionate funding for urban areas particularly is needed." Third, "at present, if money is given to nonpublic schools it is given to *All* nonpublic schools. Private schools already have tuition payments and private funds at their disposal. In many cases this would permit them to offer services that are not available to the children of public schools." Fourth, "historically, aid to nonpublic schools develops a dual and multiple school system. The support of multiple school systems will in the long run cost society more because of inherent inefficiencies and overlapping districts, services, etc." Fifth, "currently many nonpublic schools are not accountable to the public or state for performance and in some of the proposals for the aid to nonpublic schools no provision is made for performance accountability." Sixth, "a compelling aspect of equality of education is that it must be open to all without dis-

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[29]For the Iowa position, see Laws of the Sixty-Third General Assembly, Second Session, Chapter 1110, approved April 29, 1970 (formerly Senate File 1293).

[30]In addition it is noteworthy that the National Conference on Religious Educational Programs adopted a resolution in opposition to the use of public funds for parochial schools. The resolution, adopted at its annual meeting, October 12-14, argued that, in the view of administrators of county and multi-county school systems, such aid violates the Establishment and Freedom of Religion clauses of the First Amendment. *The Des Moines Register*, November 1, 1970, p. 10T.

crimination on the basis of religion or race. This is not true of nonpublic schools. The growth of nonpublic elementary schools since the passage of the Civil Rights Act of 1964 is distressing. Because nonpublic schools are restricted in their enrollment policy even men of good will find the very policies that are necessary for survival result in selecting student bodies that are basically white and in any case nearly always middle and upper class. This thus defeats the basic concept of using the schools to upgrade all persons. Good research indicates that the schools with all types of students result in better education. Aid to nonpublic schools would increase this growth tremendously and would make it very difficult to integrate public schools." Seventh, "as a nonpublic school system, the selectivity of the system necessarily leaves the unacceptable for, economic, social, academic or physical (as well as race or religion) reason to the public schools. This damages the classroom situation in the public schools. Also, class distinction grows between the two school populations. The mixing of all children and the learning process of living with those different from oneself is lost. Thus, one of the unifying factors of the nation is lost." Eighth, "as a nonpublic system grows, a large segment of parents, predominately of the affluent and educated level loses its concern for the quality of education in the public schools and the ability to maintain a higher level of financial support for public school decreases sharply." Ninth, "public schools are available for all children and should be adequately funded in order that every child receives a quality education. Parents who choose to educate their children in a specific religious or cultural atmosphere should accept their responsibility for the financial support of the kinds of schools they prefer. Public schools are the responsibility of the people to the children and the nation. The National PTA urges every member in every state branch of the PTA to safeguard the future of public education by taking a firm stand in opposition to public funds being appropriated to any schools other than publicly controlled, tax-supported schools."

Public Opinion and Tax Aid to Parochial and Private Schools

The October, 1970, *Kappan* journal of the Phi Delta Kappa Educational Society contains a section entitled, "The Second Annual Survey of the Public Attitude toward the Public Schools," by George Gallup. One of the questions asked the national sample was:

> It has been proposed that some government tax money be used to help parochial schools make ends meet. How do you feel about this? Do you

favor or oppose giving some government tax money to help parochial schools?

	National Total %	No Children In School %	Public School Parents %	Parochial School Parents %	High School Juniors & Seniors %
Favor	48	47	47	59	56
Oppose	44	44	47	33	36
No opinion	8	9	6	8	8
	100	100	100	100	100

A second question posed to the national sample was:

In some nations, the government allots a certain amount of money for each child for his education. The parents can then send the child to any public, parochial, or private school they choose. Would you like to see such an idea adopted in this country?

	National Total %	No Children In School %	Public School Parents %	Parochial School Parents %	High School Juniors & Seniors %
Favor	43	43	41	48	66
Oppose	46	46	48	40	27
	11	11	11	12	7
	100	100	100	100	100

A major problem in assessing the actual meaningfulness of the Gallup data just noted is found when one checks a similar public opinion poll of 1969.[31] The problem is that the questions asked were not precisely the same and thus there is a certain elemental danger in attempting to draw too many conclusions from such a comparison. The 1969 Gallup poll based on a national sample indicated that 30% of the poll respondents preferred private schools, 30% preferred parochial schools, and 40% preferred public schools. One suggestion that might be drawn from these figures indicates that approximately 18% more of the American people sampled by Gallup in 1970 were willing to see some form of aid to parochial or private schools. The number opposing such aid, however, has also increased by 4%.

In any event school administrators and policy makers would be making an egregious error in underassessing the support of such programs or the effectiveness of the various groups pushing for them. From this it would appear that those very seriously interested in maintaining strong public schools for whatever reason,

[31] Joseph M. Krownen, guest editor, *Phi Delta Kappan*, November, 1969, p. 132.

such as seeing them as a source of democracy in this country, apparently have not been doing an effective job in making the role of the public schools, which were designed to be true melting pots, known and fully appreciated.[32] There is, however, a factor that simply cannot be ignored and that is that one reason for the changes of the attitudes of people who formerly were strong supporters of the public schools and who conversely were opposed to providing public money for private or parochial schools must be traced today to the decay of the American inner city. This has profound effects due to the changing patterns of settlement and demographic composition of neighborhoods resulting in what is frequently referred to as the inner-core blight.

Thus, for example, members of some of the Protestant groups that have been particularly noted for their opposition to any infringement upon the role of separation of church and state may now, noting a decay in the quality of the city's public schools, take a different view of public aid to private or parochial schools. They themselves may be doing as many have already done in our larger metropolitan areas—sending their children to private or parochial schools. Thus to a person in this position public aid would have the apparent advantage of reducing the amount of tuition costs. Therefore, middle income-level Protestant parents who normally might not approve of public aid to private or parochial schools, are changing their value judgments on this matter.

Edward J. Fox and William D. Levenson in 1969 surveyed a sample of school board members in an urban metropolitan county in regard to their opinions on the merits and limitations of the

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[32]Greer, Colin, "Public Schools: The Myth of the Melting Pot," *Saturday Review*, November 15, 1969, p. 84; Greer, Colin, *Cobweb Attitudes: Essays in American Education and Culture*. New York, Columbia University Press. 1970. Another interesting analysis of a diverging view concerning the melting pot quality of the public schools is found in a most recent work by Charles E. Silberman, *Crisis in the Classroom*. New York, Random House. 1970. Silberman argues that on the basis of material gathered by him and by other notables, there are two impressions of the American public school system that stand on shaky beds of fact. As one reviewer explains it, among the theses, two in particular stand out. (A). People "in" education don't think pointedly enough about why they are doing what they do; mindless is everywhere rife. (B). The second is that at the present moment reformers and innovators have an obligation to lobby for more emphasis on the education of the feelings and imagination and for a slowdown of cognitive rat-racing. As Silberman puts it, "finding the right balance is never easy; there will always be a certain tension between two groups of educational objectives—those concerned with individual growth and fulfillment and those concerned with the transmission of specific skills intellectual disciplines and bodies of knowledge—. ". . . In the older American progressive schools the balance certainly needs to be tipped toward the cognitive; in most American schools today . . . the need is to tip it very strongly back. . . ." See, *Life*, October 30, 1970, p. 12.

voucher plan suggested by Professor Milton Friedman, the strongest proponent of free enterprise "Capitalist" economic systems.[33] Under Friedman's so-called voucher plan, the government would provide families with a voucher for each school age child guaranteeing specific sums of money which would be paid as tuition to any "approved" school. Parents would be free to spend this and additional moneys to purchase educational services. Nonpublic and public schools could complete among themselves for students by offering a variety of educational choices. Private school funds might also be used to contract for specific services.

It should be emphasized that it is normally thought that such vouchers would be used to pay tuition and other costs to existing parochial or private schools. There is in this program, however, nothing that would prevent the use of the vouchers to encourage the creation and public support for John Birch schools, Black Panther schools, Rosicrucian schools and any other school an individual or group might wish to establish. This would clearly undercut the very foundations of the public school system of this nation, which with all its faults is correctly regarded as the cradle of democracy and egalitarianism. The plan has become a major political campaign issue in a number of states, such as California, where it was a key dispute in the Unruh-Reagan gubernatorial campaign.

In their study Fox and Levenson took for their sample a large Midwestern urban metropolitan county which contained 33 school districts. Reactions were secured from 89 school board members who read a brief paragraph describing the voucher plan. Sixty-six of the respondents or 74.2% checked "I don't like it."[34] They were then asked to check their reasons. In a descending order of frequency, their reasons are as follows:

Comment	Frequency
1. It would weaken or destroy the school system.	19%
2. It would complicate school planning: e.g. forecasting enrollments, transportation, negotiations, etc.	12%
3. The vagueness of the proposal opens too many questions about controls, equalization cost differences, competition among public schools and teaching of sectarian religion.	11%
4. It would lead to increased government influence and control of all schools.	10%

[33]Edward J. Fox and William D. Levenson, "In Defense of the Harmful Monoply," *The Phi Delta Kappan,* November 1969, p. 131.
[34]*Ibid,* p. 131.

Comment	Frequency
5. It is clearly violative of the constitutional principle of separation of church and state and the use of public funds for private purposes.	8%
6. It would lead to educational chaos.	8%
7. The better approach is to improve quality, effectiveness and efficiency within the present public school system.	8%
8. It would accentuate divisiveness, segregation, socialization and misunderstanding.	7%
9. Public schools would become havens for the disadvantaged when costs outstrip government subsidy.	7%
10. It destroys the "American Way" by fostering a *socialist state.*	5%

Taking these comments, which clearly have at their base a feeling concerning public aid for sectarian purposes or for the separation of church and state principle, or the general destruction of the public schools, three obvious trends seem to evolve:

1. It would weaken or destroy the public school system.
2. The vagueness of the proposal opens too many questions about controls, equalization, cost differences, competition among public schools and the teaching of sectarian religion.
3. It is clearly violative of the constitutional principles of separation of church and state and the use of public funds for private purposes.

My rather shaky arithmetic suggests that 38 of the 89 school board members or almost half saw the church-state question as being important. In any event, Fox and Levenson concluded their study by noting that the church-state controversy is:

> Perhaps the basic theme which appears to underlie a substantial number of the negative comments of the school board members responding to this survey. The generalization is thus hazarded that the vast majority of school board members elected by their fellow citizens—regardless of their political, economic, social, and/or religious persuasion, but collectively motivated by their dedication to the best possible education under government auspices for *all* children—do not regard the kind of proposal exemplified by the kind of voucher plan as a viable alternative for the necessary improvement in quality education in America.[35]

Sources of Church-State Conflict.

As suggested by the previous section dealing with public attitudes toward public aid to private and parochial schools, it should be clear that in viewing the politics of church and state it is quite possible to identify important sources of tension that underlie and are relatively remote from the daily *sturm und drang* that seems

[35] *Ibid*, p. 134.

to swirl around the school controversy. At least one author has concluded that one can immediately sort out issues which trigger today's political conflicts, and he feels that it is possible also to spot certain emerging issues which seem likely to complicate things increasingly as time goes by.[36] Some of these I have previously alluded to and others will be presented at appropriate occasions.

One thing that all too frequently has been lost sight of in studying problems such as church-state conflicts over public and parochial schools is the simple fact that differences of religious ideology produce very different "civic" attitudes concerning the proper relationship between religious institutions and public authority. It seems almost too elemental to note, but because of vagueness in most people's minds on this subject, it must be pointed out that Roman Catholics do, in fact, operate from different premises concerning certain church-state relations than do Baptist, for example, or Jews or nonbelievers. The Jews and, of course, nonbelievers differ from all of these as well as other groups. As Morgan has pointed out. "it is with these very misconceptions of the nature of man, the state and religious enterprise that the discussion of church-state tensions must begin. From this we can move on to consider two further underlying sources of tension: animosity between creeds and differences in church structure."

As is generally known, it was well into the 20th century before America could not be considered truly a "Protestant Nation." This in no way means that most of the people were regular churchgoers, but in a cultural sense and social sense Protestant ideas and Protestant spokesmen commanded the heights in our society. As has been noted Protestant notions of individualism, equality and congregational democracy interlocked with and supported the prevailing political ideology of face-to-face government, and laissez faire.[37] Authority and centralization in religion, as they saw it, were to be held incompatible with democracy, and political liberty went hand-in-hand with individual revelations through the scriptures.

The Episcopalians, of course, are probably the exception to this brief analysis of Protestantism, since they have generally found it more difficult to be democratic and anti-episcopal. A variety of Low Church leaders, however, have given it a serious try. More-

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[36]See: Richard E. Morgan, *Politics of Religious Conflicts: Church and State Relations.* New York, Pegasus. 1968.

[37]*Ibid,* p. 20; The classic study of this subject is, of course, R. H. Tawney, *Religion and the Rise of Capitalism.* New York, New American Library. N.D.

over, because of their British associations, Episcopalians were suspect on both foreign and establishmentarian grounds. So it might be said that while the United States was predominantly provincial, it was also predominantly "free church Protestant." It is, of course, impossible to describe the variety of differences in Protestant ideas concerning religion and the public order because one cannot accurately speak of a single Protestant position.[38] There are, however, several important doctrinal themes running through Protestant thinking. Historically, a major element is certainly a doctrine imperative of Protestantism: the theory of strict separation between the churches and governments. This has as a logical outgrowth a notably negative conception of the role of the state. One of the great virtues of the principle of denominationalism was that voluntarism and privatism was more or less taken for granted by the vast bulk of Protestants of all denominations. It was perhaps regrettable that everyone could not worship in accordance with Baptist forms or Presbyterian forms or Methodist forms, but the Protestant consensus was that it would be a greater evil if everyone's independence was jeopardized. Religion as a doctrinal matter came to be viewed as strictly a private affair.[39]

Roger Williams, one of the most profound Protestant theoreticians of church and state in the United States, put it this way:

> The Church is like unto a body or college of physicians in a city; like unto a Corporation, Society, or Company of East-Indie or Turkie-Merchants or any other Society or Company in London; which Companies may hold their Courts, keep their Records, disputations; and in matters concerning their Societies may dissent, divide, break into Schisms and Factions, sue and implead each other at the law, yeah, wholly break up and dissolve into pieces and nothing.[40]

Traditionally, Baptists and Presbyterians have been more conscientious of the separationist doctrine than Episcopalians, with the Congregationalists falling somewhere in the middle. Nonetheless, the strict separation of church and state remains a powerful notion around which broad Protestant support can be mobilized.[41]

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[38]See for example: Thomas Sanders, *Protestant Concepts of Church and State.* New York, Harcourt, Brace and World. 1964.

[39]See for example: Ernst Troeltsch, *A Social Teaching of the Christian Church.* New York, Harper and Row. 1931; John P. Roche, "American Liberty: An Examination of Traditions of Freedom," in Milton R. Konvitz and Clinton Raucheter, editors, *Aspects of Liberty.* Ithaca. 1958; Winthrop S. Hudson, American Protestantism. Chicago, University of Chicago Press. 1961.

[40]Quoted from Sidney Mead, *The Lively Experiment.* New York, Harper and Row. 1963, p. 58.

[41]On the question of erosion of this solidarity, see: Martin E. Marty, *The New Shape Of American Religion.* New York, Harper and Row. 1958.

Another proud and important tradition in American thought, although distinct from but not divorced from Protestantism, is the concept of Secularism. Contrary to some of the heated debates in this country during the 1950's and heard still today—that Secularism is an undesirable and recent growth in American culture—one must see it as a phenomenon "as American as apple pie." The Constitution of the United States was profoundly affected by the secular learning of the Enlightenment, and some of the principal architects of the Constitution and the Declaration of Independence were deists and agnostic. Many of the most influential political innovators of the late 18th century were only nominally faithful to Protestantism but were notably secular in outlook.

As Richard E. Morgan has explained, what is important for us about secularism is the way in which it is interlocked with Protestantism on the subject of church and state. For both, religion is a private, voluntary and individual matter with which the state has no concern whatever. Jefferson and Williams could agree that "compulsion stinks in God's nostrils,"[42] and the secular states stood in exactly the same relationship to a religious association as did one whose purpose was for literary discussion or the companionable consumption of madeira. For quite opposite reasons tradition commanded that government keep out.

Jewish attitudes concerning church-state relationships are grounded on an entirely different experience from those of Protestants and Secularists. A desire for separation of church and state stemmed from the brutal lessons of Jewish history. Jews, as a matter of theology, are not optimistic rationalists in the Enlightenment tradition. They do not necessarily view religious associations as a result of purely voluntary identification and activity. Richard Rubenstein has pointed out, "there is nothing voluntary about the normative conception of membership in the Jewish community."[43]

American Jews generally were made separationists because of the conviction that, living in Christian countries where the state is a supporter of religious activities, Jews are apt to be made uncomfortable at best or presented at worst. Thus, in such a community, with a Christian majority, the best chance for the Jews to

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[42]Richard E. Morgan, *The Politics of Religious Conflicts: Church and State Relations.* New York, Pegasus. 1968, p.23.

[43]Richard L. Rubenstein, "Church and State: The Jewish Posture," in Donald A. Gianneila, *Religion and the Public Order.* Chicago, University of Chicago Press. 1964, p. 152.

For further analysis of the Jewish position, see: "Religious Education," *American Jewish Congress Newsletter,* July and August edition, 1970.

live decently is assured by a scrupulously secular state—a state which does not advocate support or interact in any way with religion. Therefore, secularization becomes a salvation for a typically small religious minority. Jews, for example, favor many of the separationist outcomes in governmental policy as do the Protestants and secularists. Again this indicates that a variety of factors may bring highly diverse groups together on matters of public policy.

When we study the Roman Catholic position it becomes clear that, because of the variety of elements inherent in their theological premises, certain important policy prescriptions substantively vary from the position of the groups just mentioned. Unfortunately, what has been difficult for people who are otherwise quite sophisticated in matters of this nature to understand is that philosophical differences between the various groups just mentioned are of such magnitude that no amount of good will can compromise them so long as the parties continue to take their traditional ideologies seriously. No matter how one faces the situation or how carefully it is analyzed, it is clear that Roman Catholics in general take a favorable view of cooperative relations between government and religious institutions.

This is illustrated nicely by the Roman Catholic legal theorist, Norman St. John-Stevan, who demonstrates beyond a doubt the contradiction between the Roman Catholic and Protestant position concerning the nature of the state. St. John-Stevan writes that:

> The Catholic starts with the conception of the good but damaged natural man; the Protestant with an idea of man utterly corrupted by the Fall. For the Catholic the state would have been necessary for man had he remained a perfect being; for the Protestant it is the direct result of original sin. For Luther the world was sin and the devil its landlord. The employment of [state] power to further social and religious ends seems reasonable to Catholics, but Protestants, at least in theory, are distrustful of all worldly power, as contaminated by sin.[44]

While it is true that Calvin took quite a different view of this situation than Luther, it is also true that American Protestantism has been much more Lutheran than Calvinistic in its orientation and attitudes concerning the state. Somewhat ironically, European Lutherans have ultimately come to accept the notion of establishment particularly so far as it applies to schools in nations such as the Netherlands, Protestant portions of Germany and the Scan-

[44]Norman St. John-Stevan, *Life, Death and the Law.* New York, Merr. World Publishing. 1964, p. 31.

dinavian countries. In America, with a few recent exceptions, Luther's negative view of the state has continued to be translated into the separationist doctrine.

One of the more articulate Roman Catholic theologians who concerned himself with the church-state dispute was the late John Courtney Murray, S.J. Father Murray was regarded by many to have presented what might be regarded as the rather typical Roman Catholic concept of church-state relations. In his book,[45] Murray rejected the phrase "separation of church and state," and referred rather to the *distinction* between church and state. "The first article of the American political faith is that the political community is a form of free and ordered human life and looks to the sovereignty of God as the first principle of its organization." Therefore, Murray supported cooperative arrangements between government and religious institution on a carefully limited and nondiscriminatory basis. Thus, when one looks at the spectrum of Roman Catholic theorists from the more sophisticated to the less subtle, one finds deep skepticism about the wisdom and historical foundations of the basically separationist line which the United States Supreme Court has taken during the last twenty years. This culminated in 1962 and 1963 in decisions banning compulsory prayer and Bible reading in the public schools.[46]

The so-called "accommodationist" predisposition of Roman Catholics, which favors cooperative arrangements between church and state, gives rise to a reading of the Constitution's religion clauses in a pragmatically different way than the Protestant reading. Roman Catholics find it difficult to accept the theory that the First Amendment holds religion to be a purely private concern to which the state is morally neutral—a theory in which the state has no legitimate interest in the relationship of men to God. It is essential to emphasize once again that this is precisely the assertion at the heart of the Protestant separationist theory and is adhered to for a variety of different reasons by secularists and most American Jews. The point that is important to dwell on is not merely to regret the existence of these highly divergent views of

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[45]John Courtney Murray, S. J., *We Hold These Truths.* New York, Sheed and Ward. 1964, pp. 72-73.

[46]For a sophisticated analysis of the Roman Catholic position, see: Robert F. Drinan, *Religion, The Courts and Public Policy.* New York, McGraw-Hill. 1963. Joanne M. Krewin, *The Catholic Viewpoint on Church and State.* Garden City, New York, 1960; for a somewhat less subtle and more exiguous view, see: William O'Brien, *Justice Reed and the First Amendment.* Washington, D.C., Georgetown University Press. 1948; James M. O'Neill, *Catholicism and American Freedom.* New York, Harper. 1952.

church-state relations but to recognize that they not only do exist but are held by men with significant and deep conviction.

While it is not one of the more pleasant things to discuss, it would be unscholarly not to recognize that various religious antipathies play a role in policy formation that is frequently deeper than even some of the best political analysts would like to believe. As a result there can be little doubt that there is a significant carry-over in such a basic and critical field as church and state relations and the public school system. In one of the most noted investigations of 1960 election results, Phillip E. Converse, Angus Campbell, Warren E. Miller and Donald Stokes of the Survey Research Center of the University of Michigan found rather surprising defections of regular Democratic "party identifiers" who had in 1956 voted for Stephenson and were later in 1960 to swing to Nixon. This tendency was most evident in the South. See Table I.[47] The tendency of Democrats to swing to Nixon in 1960 correlated strongly with high Protestant church attendance. See also Figure I.[48] The study's conservative estimate of John F. Kennedy's net loss on "the religious issue" was 2.2% of the total vote, which is roughly the difference between a 52-48 victory and a 50-50 tie.

There is, of course, a possibility that all of those Democrats who voted against Kennedy because of his religion did so out of the reasoned conviction that a Roman Catholic in the White House would be a dangerous thing. Many distinguished Americans were persuaded by this point of view and there are those who feel a case can be made for it. Yet the imagination is boggled by supposing that such reasoned deliberation was a major factor in the anti-Catholic vote of 1960. The bulk of religious defection from the Democratic candidate seems much more likely to have resulted from ancient unreasoning antipathy to the Church of Rome.

The Survey Research Center of the University of California at Berkeley produced some additional data along these lines. The Center has been conducting an extensive study of anti-semitism in America. One part of this study sought to discover the extent of anti-Semitic attitudes within nine Protestant denominations. The interview scheduled to generate the data also included a number of inquiries concerning Protestant attitudes toward Roman Catholics. While the answers given to the Berkeley questions

[47]Campbell, Converse, Miller and Stokes, "Stability and Change in 1960," *American Political Science Review*, p. 278.
[48]*Ibid*, p. 277.

do not necessarily reflect the sort of antagonisms we have been talking about, they certainly are worth noting. Given the nature of the question, it was possible for a person to respond negatively from reasoned conviction as would be the case of the anti-Catholic voting study of 1960. The directions shown in the data, however, are suggestive. Substantial percentages within all of the denominations thought it "tends to be true" that Catholics seek to impose their religion on others. See Table II. Significant percentages felt that the American Catholic community seeks to advance its own interest through bloc voting. See Table III. Deep suspicion of the Catholic Church abroad is reflected in Table IV. This study interestingly enough also found considerable anti-Semitism among Roman Catholic and Protestant respondents.[49] The Southern Baptists, in most cases, prove to be the Protestant denomination which can be intuitively identified as harboring intense emotional antipathy toward the Roman Catholic Church; in the study they returned the highest negative response. Those denominations which may be identified as more urbane and tolerant of Roman Catholicism, such as Episcopalians and Congregationalists, had lower negative scores.

Contemporary Judicial Activity

In dealing with a subject of this nature at the present time, one is standing on the thinnest of ice. There are a number of cases either in the process of litigation or which have been litigated on a trial court level and are on appeal. Thus as these words are being presented, some of these issues and points of law are in the process of modification. The topical quality of this particular subject cannot be over-emphasized.

It is, however, logical at this moment to begin with probably the major of the two cases presently docketed before the Supreme Court which may, in fact, be decided by the time this presentation is made. The first is the case of *Lemon v. Kurtzman.*[50] The fact situation in the *Lemon* case involves a suit seeking to enjoin the alleged constitutional approval and expenditure of state funds under the Pennsylvania Nonpublic Elementary and Secondary Education Act. The educational act empowers the State Superintendent of Public Instruction to contract for the purchase of "secu-

[49]See: Charles Glock and Rodney Stark, *Christian Beliefs and Anti-Semitism.* New York, Harper and Row. 1966, pp. 60-80. These findings are also discussed by R. E. Morgan, *The Politics of Religious Conflicts,* pp. 30-35.

[50]310 F. Supp. 35 (1969); Prob. Juris. noted 90 S.Ct. 1354; and docketed 1189 October term 1970.

lar educational services" from nonpublic schools which fulfill the compulsory attendance requirement of Pennsylvania law.

In its legislative conclusion, the legislature determined that a crisis existed in education due to rapid increases in both cost and student population; that twenty percent of all school children attend nonpublic schools; that such education constitutes a public welfare purpose and nonpublic schools contribute significantly to this purpose. The conclusion was, therefore, that it was a governmental duty to support the achievement of this purpose by supporting the purely *secular* objectives of nonpublic education.

Briefly, the Pennsylvania statute provides that the state may enter into contracts with nonpublic schools for the purchase of secular educational services. These purchases are to be at the actual cost of three items: Teacher's salaries, textbooks, and instructional materials. Purchases are limited to courses in mathematics, modern and foreign languages, physical sciences, and physical education. The superintendent must approve all materials and texts, all teachers must be state certified, and a satisfactory level of student performance must be obtained in standardized tests.

Payment under the law is made on a reimbursement basis, only after services have been rendered and upon presentation of certain required records. Funds for the operation and administration of the act are drawn only from the Nonpublic Elementary and Secondary Education Fund. The money comprising this fund is taken exclusively from the proceeds of state horse and harness racing.

As the federal district court in Pennsylvania saw the issues, they looked something like this. First, do plaintiffs and citizens who attended race tracks, and citizens who contend that to do so would compel them to support religion in violation of the First Amendment have standing to challenge the Pennsylvania statute as taxpayers? Second, does the Pennsylvania Nonpublic Elementary and Secondary Education Act violate the Establishment clause of the First Amendment? The district court upheld the act by a two to one vote and held for Kurtzman.

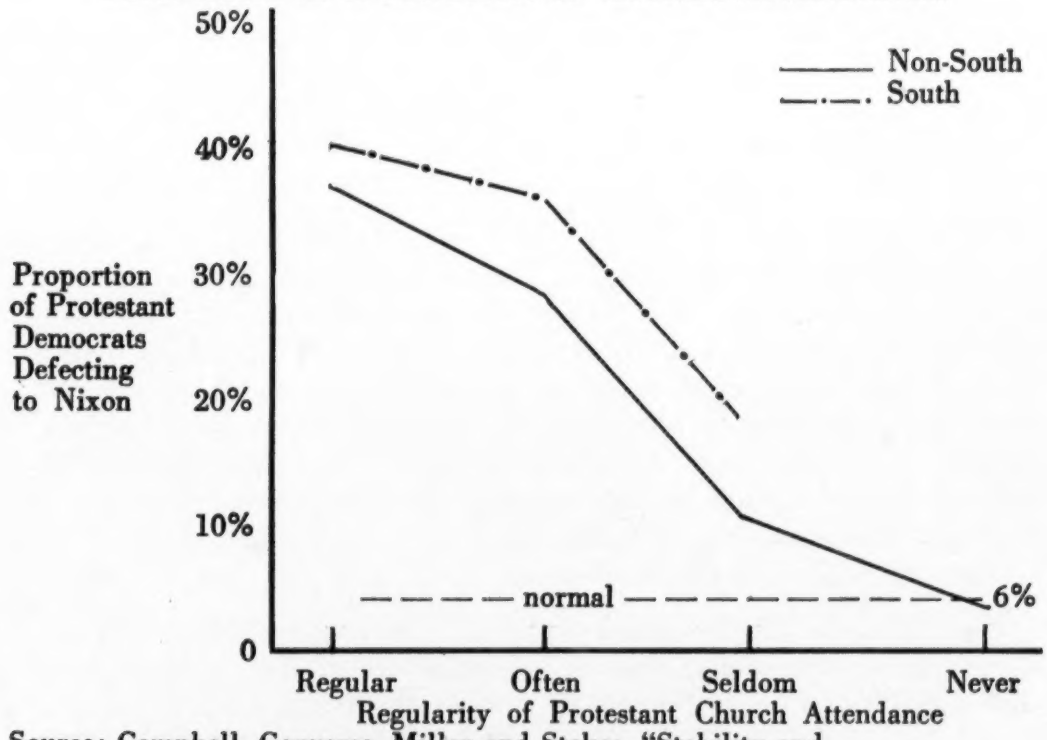
The rationale of the court went as follows, regarding the two issues: the procedural matter of the *standing* of the organizational and individual plaintiff to bring suit; and the substantive issue of the constitutionality of the Pennsylvania statute when paired-off

TABLE 1
OFFSETTING EFFECTS OF THE CATHOLIC ISSUE,
1960 DEMOCRATIC PRESIDENTIAL VOTE

Area		% of 2-party vote in area
Outside the South, Kennedy's "unexpected" . . .		
Gains from Catholics		5.2%
Losses from Protestant Democrats and Independents		—3.6
	NET	+1.6%
Inside the South, Kennedy's "unexpected" . . .		
Gains from Catholics		0.7%
Losses from Protestant Democrats and Independents		—17.2
	NET	—16.5%
For the nation as a whole, Kennedy's "unexpected" . . .		
Gains from Catholics		4.3%
Losses from Protestant Democrats and Independents		—6.5
	NET	—2.2%

Source: Campbell, Converse, Miller and Stokes, "Stability and Change in 1960," 55 *American Political Science Review* at 278

FIGURE 1
DEFECTIONS TO NIXON AMONG PROTESTANT DEMOCRATS AS A FUNCTION OF CHURCH ATTENDANCE.



Source: Campbell, Converse, Miller and Stokes, "Stability and Change in 1960," 55 *American Political Science Review* at 277

TABLE 2

Reply to: Catholics try to impose their religious practices on others, answers are in % with "Don't knows" not shown. N=3,000

	Congregational	Methodist	Episcopal	Disciples of Christ	Presbyterian	Lutheran (L.C.A. & A.L.C.)	American Baptist	Lutheran (Mo. Synod)	Southern Baptist
True	11	16	19	14	23	18	18	23	25
Tends to be true	31	30	31	34	26	32	28	41	16
Tends to be false	31	31	23	28	23	23	26	16	38
False	21	19	23	18	22	21	21	15	16

Source: Survey Research Center, University of California at Berkeley.

TABLE 3

Reply to: Catholics tend to vote as a bloc for Catholic political candidates. Answers are in % with "don't knows" not shown. N=3,000

	Congregational	Methodist	Episcopal	Disciples of Christ	Presbyterian	Lutheran (L.C.A. & A.L.C.)	American Baptist	Lutheran (Mo. Synod)	Southern Baptist
True	22	31	37	28	39	28	38	41	43
Tends to be true	45	44	35	36	36	38	36	27	39
Tends to be false	17	13	13	28	11	16	12	16	8
False	9	7	10	2	7	10	6	7	4

Source: Survey Research Center, University of California at Berkeley

against the religion clauses of the First Amendment. The district court noted that the organizational plaintiffs assert their standing solely on the grounds that they are organizations established for the purpose of either maintaining separation of church and state or preventing racial discrimination. In the case of *Flast v. Cohen*[51] the district court stated that "the emphasis in standing problems is on whether the party invoking federal court jurisdiction has a 'personal stake in the outcome of the controversy.'" The district court found, however, that it could perceive no such personal stake in this particular instance. Consequently the organizational plaintiffs, the court found, failed to establish standing as to both the religious and equal protection issues involved in the case.

The district court then turned to the question concerning the individual plaintiffs and found that it fell into two categories, jurisdictionally speaking. Plaintiff Lemon, having attended the race-track, contended that he had standing under the *Flast* decision. The *Flast* case, the district court noted, dictates two requirements: One, a logical link between that status and the type of legislative enactment attacked, and two, a nexus between that status and the precise nature of the constitutional infringement alleged. In the *Flast* case, both elements were satisfied, the district court argued since it was alleged that the taxing and spending powers of the national government were being used in excess of this specific constitutional limitations imposed by the First Amendment. These are precisely the allegations made by Lemon, the district court noted, and they held that he, therefore, had demonstrated standing to challenge the act under the Establishment and Free Exercise clause of the First Amendment.

The other individuals differ in that they have not attended the racetrack, contending that to do so would compel them to support religion in violation of their rights of conscience, the district court explained. The district court noted that, "The personal right to freedom of conscience is protected by the Free Exercise clause of the First Amendment and the state may not condition other rights or privileges on the sacrifice of this freedom."[52] These plaintiffs, therefore, also have standing to sue, the court found.

The remaining question as the district court saw it was whether these plaintiffs had standing to challenge the act on equal protection grounds. The education act does not use religion or race

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[51] 392 U.S. 83, 99.
[52] 310 F. Supp. at 42.

as a guideline, nor does it make any classification to deny equal treatment to members of any race or religion. There is no allegation on the part of the plaintiffs the court observed, that suggests personal stake or adverse legal interests. Hence, the court concluded that plaintiffs have failed to establish standing under the Equal Protection Clause.

Moving to the second general area of the court's rationale, the district court observed that the plaintiffs alleged as a fact that the purpose and primary effect of the act was to aid religion. That allegation, the court believed, asserted not a *fact* but a conclusion of *law* and as such could not be admitted for purposes of testing the sufficiency of the complaint. The question of law then presented, as the district court saw it, is whether the purpose or primary effect of the act is to advance or inhibit religion. The federal district court concluded, however, that the purpose of the act could be found clearly on its face. The declared purpose is, the court said, "to promote the welfare of the people of the Commonwealth of Pennsylvania" and "to promote the secular education of children of the Commonwealth of Pennsylvania attending nonpublic schools."

The district court then quoted the *Everson* case,[53] "the fact that a law, passed to satisfy public need, coincides with personal desires of the individuals most directly affected is certainly an inadequate reason to say that a legislature has erroneously appraised the public need."

The district court pointed out that the statute is limited not only to secular subjects, but to a limited number of specific secular topics. Further safeguards, the court felt, were assured by the fact that the aid to sectarian objectives is necessarily incidental and, therefore, not at odds with the Establishment clause of the First Amendment. Concerning the plaintiff's argument that the act offends the Free Exercise clause, the district court quoted the *Schempp* case,[54] "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." The appellants have not shown, in their attendance or nonattendance at the racetrack, that the law in any way coerces them as individuals in the practice of religion. The court, therefore, concluded that citizens that attended racetracks and citizens who contend that to do so would

[53] 330 U.S. at 6.
[54] 374 U.S. at 233.

compel them to support religion in violation of the First Amendment do have standing to challenge the statute, but that the complaints alleging as fact conclusions of law—in other words that the purpose of the statute was to aid religion—stated no claim upon which relief could be granted by a federal court. Finally the court flatly concluded that the Non Public Elementary and Secondary Education Act does not violate the First Amendment Establishment clause or the Free Exercise clause of the United States Constitution.

Chief Justice Hastie of the United States Circuit Court, who was sitting on the three member district court, dissented. The thrust of his dissent was the fact that the primary effect of the act was the advancement of sectarian objectives. Furthermore, public welfare via secular education is in fact incidental, he concluded.

As I have noted earlier, this case has been accepted by the Supreme Court, but no decision has been handed down. Attempts to obtain the briefs of both parties from the Clerk of the Supreme Court have been unsuccessful in that the Clerk has indicated that they are not available. The Attorney General's office of the State of Pennsylvania has been gracious enough in the interim to supply to this writer a copy of its brief. Another most important amicus curiae brief has been filed by Leo Pfeffer, the noted scholar and counselor in the area of church-state relations, on behalf of the American Association of School Administrators, the American Vocational Association, the Association for Supervision and Curriculum Development, The Horace Mann League of the United States, The National Association of Elementary School Principals, The National Educational Association, The National School Boards Association, and the Rural Educational Association.[55] It is most helpful for our purposes at this juncture to note first the argument taken by Mr. Pfeffer in his amicus brief because of the outstanding and perceptive quality of the reasoning.

Mr. Pfeffer first addresses himself to the question of the interest of the amici involved in bringing the brief, and points out that they represent hundreds of thousands of Americans directly and substantially involved in public education as teachers, administrators and members of school boards. The brief goes on to note

[55]The Nixon administration expressed support for the Pennsylvania statute and filed a brief with the Supreme Court on Friday, October 30. In the brief the Solicitor General argued that the money appropriated under the statute was utilized solely for non-religious purposes, and thus did not constitute a violation of the religious clauses of the First Amendment.

Justice Frankfurter's observation that the public schools were "designed to serve as perhaps the most powerful agency for promoting cohesion among heterogeneous democratic people,"[56] concurring public school system rests on three fundamental principles of universality—universality of control, of access and, therefore, of support. Furthermore, Pfeffer points out that the public school system is controlled by all of the public, even by those whose children do not attend it.[57] The public school system is open to all; it may not exclude children whose parents are too poor to pay taxes any more than those whose parents are wealthy enough to pay tuition at a private school. A very important point in this day and age was noted in the brief in that the public school system, unlike private schools, may not exclude children because of their race,[58] religion,[59] political beliefs,[60] or because their standards of behavior or intellectual achievement may be below those which school authorities would like to maintain. And, moreover, because it may not close its doors to any of the public, it is constitutionally entitled to financial support out of taxes imposed upon all of the public, including those who have no children or elect to send their children to nonpublic schools.[61]

Concerning the interest of the amici the brief goes on:

> We are not unaware of the failings of the public school system. We recognize that it is being subjected to widespread criticism, particularly in its operation in crowded impoverished urban areas. To a substantial extent this criticism attributes to the public schools responsibility for so much of the ills of urban poverty, thus perhaps revealing how much is expected of *them* (emphasis added) nevertheless, recognizing the deficiencies of public education we believe that the solution is to be sought in improvement not in dismemberment.

As has been pointed out before, the brief emphasizes the important fact that the American public school system is one of the most precious contributions we have made to modern civilization. It would be a tragedy, not only for Americans, but for all the world, if it were destroyed.

Pfeffer makes a point that I have made earlier, as have others elsewhere, and that is the fact that there has been increasing and successful efforts throughout the United States to siphon off public

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[56] *McCollum v. Board of Education*, 333 U.S. 203, 216 (1948).
[57] *Kramer v. Union Free School District*, 395 U.S. 621 (1969).
[58] *Brown v. Board of Education*, 347 U.S. 483 (1954).
[59] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *McCollum v. Board of Education*, 333 U.S. 203 (1948).
[60] *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).
[61] *Stuart v. School District No. 1*, 30 Mich. 69 (1874).

funds for nonpublic schools. The inevitable result, if this practice is not halted, will be a proliferation of private schools with an escalation of the exodus of middle-class children from public schools. The end result obviously cannot be anything but a public school system inhabited almost exclusively by the disadvantaged poor. This would mean, in practice, that we would be returning to the days of the degrading charity schools although they would now be euphemistically labelled public schools.

The various parties submitting the amici brief do so, it is noted, because they believe that the current extensive effort to divide tax-raised funds between public and nonpublic schools represents the gravest crisis public education has faced in its history.

Concerning the nature of the action brought, the brief of Pfeffer points out that under the Pennsylvania statute no professional requirements are imposed in respect to teachers *presently* employed in the nonpublic schools or those engaged within five years after the effective date of the statute. Thereafter new teachers employed will be required to hold certification by the Department of Instruction equal to the standards of the teachers in the public schools. This is a point which obviously was overlooked or ignored by the district court. Another very important point, conveniently ignored by the district court, is the fact that the statute neither requires nor contemplates that the services so compensated shall be available to all the children equally. Nothing requires a school, wishing to avail itself of the benefits of the statute, to admit children that it would otherwise not admit. For example, nothing in the statute forbids private schools from excluding children on the basis of race, religion, poverty, inability to meet prescribed aptitude or achievement standards, maintenance of prescribed behavior standards or any other grounds.

Moreover, it should be emphasized that while the law requires that nonpublic schools achieve satisfactory levels of pupil performance, nothing in the law precludes a school from expelling and thus sending to public schools children unable to meet these levels. Therefore, the rationale behind the act—that if nonpublic schools close down, children would therefore be transferred to public schools and the cost of educating them would be substantially higher—has very little merit.

Another important point brought forth in the brief concerning the question of standing to bring suit is the fact that the plaintiffs in the action are a number of individuals, residents and taxpayers

of the state who share an important and common objective—the separation of church and state. And their opposition to the use of public funds for the support in whole or in part of sectarian schools whose policies and practices, by purpose or effect, exclude or otherwise discriminate against persons by race or religion has a direct bearing on a number of them: one of the parties to the suit is a negro parent of a child attending a public school; others are religious groups such as the Jewish Community Relations Conference and the American United for Separation of Church and State, and nothing under the law would prevent private schools from prohibiting entrance of children of members of any of these organizations to their schools.

The amici brief is itself addressed to but one single question. That is whether the statute as applied to schools organized, controlled and operated to promote a particular religion violates the Establishment clause of the First Amendment. There can be no question that the law herein challenged provides for a direct subsidization out of public funds of schools organized, controlled and operated to propagate particular religious faiths. "Under the principle whose origin antedates the First Amendment but which was most authoritatively expressed in *Everson v. Board of Education,*[62] such subsidization is violative of the First Amendment. This principle has never been repudiated by this court and remains today the law of the land," the brief points out. But even if the district court was correct in applying only the purpose-effect test expressed in its present form in *Abington School District v. Schempp*[63] the statute is likewise unconstitutional since its purpose and certainly its effect is to advance religion.

Referring to a case of this year,[64] the statute would certainly fail the test put forth which prohibits such entanglements of state and religion as those in *Walz,* because they are forbidden by the First Amendment.

The Pfeffer brief points out a very important procedural gambit that was utilized by the district court in its ruling. It held that the allegation of the complainant was that the challenged law had as its purpose and primary effect the advancement of religion. The district court found, however, that the allegation was not one of fact but a conclusion of law. On this ground, the

[62]330 U.S. 1 (1947).
[63]347 U.S. 203 (1963).
[64]*Walz v. New York City Tax Commission,* 90 S.Ct. 1409 (1970).

court denied jurisdiction to hear the case. This has the effect of assuring that no matter what the plaintiffs may prove within the reasonable scope of the factual allegations they will not be entitled to prevail jurisdictionally, on the basis of the logic of the district court. Thus, by denying the plaintiffs the opportunity of proving how the statute is, in fact, carried out the district court held that irrespective of what is done under the statute, so long as it does not violate its expressed terms, it cannot as a matter of law have the affect of advancing religion.

Obviously the amici brief feels this finding to be erroneous because, even if legislative purpose was deemed a matter of law not admitted on a motion to dismiss for insufficiency, the same cannot be true of the effect. The effect of the statute is not something that can be judicially decreed. The court in *Board of Education v. Allen*[65] did indeed decide the issues without a trial, but there the complainant challenged the statute only on its face and not as it was applied, and, in addition, both sides opted for summary judgment without trial, thereby conceding that no factual issues needed to be determined. Thus the *Allen* case is not directly in point.

Continuing along these procedural lines it is noted:

> that even if one assumes the allegations in the complaint regarding purpose and effect of conclusions of law and hence not being admitted, the same cannot be said of the allegations that the institutional defendants herein and most other educational institutions which have applied for payment under the act are sectarian institutions which are One, controlled by churches or religious organizations, Two, have as their purpose the teaching, propagation and promotion of a particular religious faith, Three, conducting their operations, curriculum and programs to fulfill that purpose, Four, have policies and practices which exclude from admission or otherwise discriminate against persons by reason of race, and Five, which discriminates by reasons of race or religion in the employment of teachers and other persons to administer the educational services specified in the statute."

This procedural finding effectively deprives the plaintiffs, or anyone similarily situated, of the opportunity to establish, by an examination into the legislative history of the statute, that its purpose was to subsidize nonpublic schools. The court, it is argued, can hardly fail to see what everyone else sees, namely that what is called a purchase of services is nothing but a subsidy under a different label. The brief indicates a point made earlier concerning the increased drive toward paying public funds for parochial

[65] 392 U.S. 236 (1968).

schools by noting that within the last two years at least seven states have undertaken to give subsidies to parochial and other private schools. (These are: Pennsylvania, Ohio, New York, Connecticut, Rhode Island, Iowa and New Hampshire).

Courts and certainly the Supreme Court of the United States need not be bound by legislative statements concerning the purpose of a statute. As Mr. Justice Brennan noted in his opinion, *Adickes v. S. H. Kress and Co.*,[66]

> A legislative or constitutional provision need not be considered in isolation but may be examined 'in terms of its' immediate objective, 'its' ultimate effect and 'its' historical context and the conditions existing prior to its enactment.

The Pennsylvania statute is merely another example of one of many subtle and some not so subtle attempts to effect subsidization of parochial schools without appearing too flagrantly to be violating the First Amendment. While it is labeled a "contract for the purchase of services," the transaction between the state and sectarian school is no such thing, the brief emphasizes. The school receives public funds for continuing to do what it has always been doing and what it has legally been required to do. The same teachers continue to give the same instructions to the same children in the same place at the same time and under the same ecclesiastical control as theretofore. *No child has a legal right to enter the school and demand participation and the instruction paid for by the public* (emphasis added).

To demonstrate that, whatever test is used, such subsidization is not permissible under the First Amendment,[67] the brief traces an evolution of the doctrine from the famous *Everson* case and its test through the *McCollum*[68] case, *Zorack v. Clauson*,[69] *McGowan* case,[70] *Torcasco v. Watkins*,[71] *Engle v. Vitale*,[72] *Schempp* case,[73] up to the Allen decision previously mentioned.[74] Two quotations from the Everson case are worth noting. One, the court pointed out:

> New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an

[66] 38 U.S. L. W. 4434 at 4447 (June 1, 1970).
[67] *Everson*, 330 U.S. at 16.
[68] 333 U.S. at 210.
[69] 343 U.S. 306 (1952).
[70] 366 U.S. 420, 443 (1961).
[71] 367 U.S. 448, 493 (1961).
[72] 370 U.S. 421, 431 (1962).
[73] 373 U.S. at 22.
[74] 392 U.S. at 242.

> institution which teaches the attendant faith of any church. Second, no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach, or practice religion.[75]

The brief also notes especially the statement in the *Schempp* case where the court noted as follows:

> What is the purpose and the primary *effect* of the enactment? (emphasis added) If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say to withstand the stricture of the Establishment clause there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion.[76]

Obviously, the practical problem facing the draftsman of this brief was how to deal with the *Allen* case, where the court upheld the constitutionality of the New York statute providing for the loan of secular textbooks to children attending nonpublic schools, including parochial schools. The Court applied the *Schempp* test and held that it could not assume that either the purpose or primary effect of the statute was to advance religion. Moreover, in the *Allen* case, the court quoted the *Everson* rule favorably which the brief suggested is hardly an effective way of repudiating a principle.

It should be noted that in the *Allen* case the court held, as in *Everson*, that where the state undertakes a secular program for the benefit of children, the program is not constitutionally impermissible merely because of an incidental by-product—benefit of religious educational institutions. But, in the *Allen* case, the court specifically noted the following critical point:

> Books are furnished at the request of pupil and ownership remains, at least technically, in the State capitol. *Thus no funds or books are furnished parochial schools, and the financial benefit is to parents and children, not to schools.* (emphasis added)

To emphasize this critical distinction the court noted the fact situation in the *Allen* case in the following manner:

> It should be noted that the record contains no evidence that any of the private schools in appellants' district previously provided textbooks for their children. There is some evidence that at least some of the schools did not; intervenor or defendants (parents of children attending parochial schools) asserted that they had previously purchased all their children's textbooks.[77]

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[75] 330 U.S. at 15 and 16.
[76] 373 U.S. at 222.
[77] 392 U.S. at 243-244.

The point to be emphasized is the *Allen* case, unlike the present case, presented no instances of governmental financing which relieved the sectarian schools of an expenditure which it otherwise would be forced to make.

On the same day that the *Allen* decision was handed down the Supreme Court decided *Flast v. Cohen,*[78] which also supports the conclusion the Pennsylvania law is unconstitutional. The *Flast* case, the Court specifically stated, was not being passed upon on its merits, but rather on the question of the plaintiffs' standing to sue. In other words, there was sufficient claim under the Establishment clause. The Court thus found that there was, in fact, standing to sue, and that such a holding could not have been made if governmental financing of the so-called secular aspects of sectarian schooling did not raise a constitutional issue under the First Amendment. Were such financing not inconsistent with the Establishment clause, the plaintiffs' challenge would simply be to an expenditure for the general welfare, a challenge which, the court held, could not be made by a taxpayer in the form of a taxpayer's suit under the famous *Frothingham v. Mellon* case.[79] That programs such as the one involved in the *Lemon* case must be deemed subsidization of institutions propagating religion and thus are violative of the Establishment clause would seem to have been accepted by the Court in the *Flast* case. At one point there the court explained:

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. . . . the concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending powers conferred by Article I, Section 8.[80]

In the *Walz* case of 1970,[81] the court, in upholding the tax exemptability of religious institutions, made it quite clear that it was not sanctioning governmental subsidization of such an institution. The whole tenor of the decision reflects a constitutional

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[78] 392 U.S. 83 (1968).
[79] 262 U.S. 447 (1923).
[80] 392 U.S. at 103-104.
[81] 90 S.Ct. at 1412.

distinction between subsidy and exemption, and an avoidance of anything that might be construed to impair the vitality of the basic *Everson* principle. This point was emphasized by the Court as follows:

> The grant of tax exemption is not sponsorship since the government does not transfer part of its revenue to *churches* but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or *employees 'on the public payroll.'* There is no genuine nexus between tax exemption and the establishment of religion.[82]
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> [82] 90 S.Ct. at 1415; (emphasis added).

The amici brief in the *Lemon* case emphasizes that in this case the state government does transfer part of its revenue to churches and does, in fact, place the employees of the church schools "on the public payroll," for that indeed is the sole purpose of the statute here challenged.

The Pennsylvania statute, if not on its face, at least as applied must have the effect of advancing religion, it is argued. That which aids religion advances it and the effect of aid to religion is obviously to advance it. Concerning the *Schempp* criterion of "primary affect," the brief explains that the word *primary* there means that the aid to religion is a direct consequence rather than an incidental by-product of governmental action. In the complex world in which we live, the vast range of governmental activities is such that very few, if any, private institutions, religious or secular, are not in some way affected by governmental action, either to their advantages or disadvantages.

In the *Walz* case the Supreme Court observed that no religious body that maintains schools would deny that the affirmative if not dominant policy of church schools is to assure future adherence to a particular faith by having control of their total education at an early age.[83] The amici brief in the *Lemon* case argues that it is impossible to conceive how subsidization of such schools, even if the funds are earmarked for secular subjects, can be held not to have a primary or dominant effect of advancing the particular religion which maintains schools. Judge Hastie recognized this in his dissenting opinion in the district court and pointed out:

> It is unrealistic to view the present statute as merely subsidizing secular instruction and thus only incidentally benefiting religious institutions by releasing their funds for religious purposes. The primary purpose for which sectarian schools formulate and offer a comprehensive curriculum

[83] 90 S.Ct. at 1412-1413.

apart from the public school system is religious. Through a total educational program offered in a separate religious environment, sectarian schools serve to inculcate and reinforce in children doctrine and moral precepts derived from the tenets of the church. It is not necessary to inquire whether, for the fulfillment of this primary religious purpose every course is taught with religious overtones. The crucial consideration is that the total teaching program is offered in a separate religious environment and for the better achievement of appropriate religious objectives. When the state reimburses the sectarian school for any part of that curricular cost of such a teaching program it directly finances and supports a religious enterprise. Constitutionality, such subsidizing of religious enterprise is not essentially different from the payment of public funds into the treasury of a church.

This same fundamental point was made by the Supreme Court of the State of Maine in an advisory opinion on January 15, 1970.[84]

> Fundamentally it cannot be denied that the sectarian school exists for the purpose of adding an additional dimension to it the advancement of the faith to the secular education to which it is allied. If the parents sought only secular education, such is available to them as a matter of right in the public school system. Sectarian school education is selected for its religious atmosphere and teaching.
> Budgets for the secular instruction may be technically separable from the budget of the entire operation of the school, but the institution is an inseparable whole, which is strengthened in its institutional purpose when it is strengthened in any of its departments by outside financial assistance. Economics is not the controlling factor in determining the validity or invalidity of L. D. 1751. The constitution is a controlling factor. The school administrative units accomplish nothing under this act that could reasonably be accomplished within the public school system and without that method of sectarian schools.

The Maine court, when viewing the *Schempp* test and the theory that, if the sectarian school closed, student burden would be placed on the public school system, went on to say that, "such subsidization, by its assuring the continuance of the school, assures the continuance of the purpose for which the school exists—advancement of the faith it represents. The net result of all of this is for the state to invade the sectarian school system in a manner which violates the independence to which it is constitutionally entitled. The result is not the neutrality required by the Constitution."

In a later advisory opinion the Supreme Court of Massachusetts on May 11, 1970 ruled that the "purchase" of educational services from sectarian schools was prohibited by the state constitution. The bill involved an indirect form of aid to nonpublic schools based on the assumption that the development of every elemen-

[84] 261 A.2d 58.

tary and secondary school, public or nonpublic, serves the public purpose of the Commonwealth. And in still a later advisory opinion the Massachusetts high court faced the question, does the state constitutional provision prohibiting such aid violate the First and Fourteenth Amendment in that, fulfilling a stated public purpose, i.e. educating their children, the parents of nonpublic school pupils are being deprived of their share of the public tax funds.[85] The court answered the question simply by replying that in sending his child to school, the parent is not fulfilling "stated public purpose." The significance of that phrase is in the declaration of a legislative purpose. The students of nonpublic schools and their parents are not denied equal protection of the laws, since they have equal access to the public schools.

The court went on to note that there is no basis for implying any right of the parent of private school students to reimbursement from public funds for any part of the expenses incurred in exercising their privilege to obtain for their children a nonpublic school education. The contemporary quality of this dispute is emphasized once again by a case decided by the United States District Court for Rhode Island on June 15, 1970. This is the case of *DiCenso v. Robinson*,[86] where the court held the state statute to be unconstitutional. The majority—Circuit Judge Coffin and District Judge Bownes—based their rejection on the grounds that it violated both the *Schempp* and *Walz* test. The minority—District Judge Pettine—while not dissenting from the majorities holding the law was unconstitutional based his view on the ground that it violated the *Walz* test. Judge Coffin's opinion presents a carefully considered analysis which the amici brief in the *Lemon* case calls especially to the Court's attention. Judge Coffin said:

> The second part of the *Schempp* test—determining the statute's 'primary effect'—presents a more difficult problem of both definition and application. Plaintiffs have argued that 'primary' means 'essential' or 'fundamental.' Defendants and intervenors 'primary' means 'first in order of importance.' The problem of definition is critical in this case because as we have noted in our findings, the Act has two significant effects: On the one hand, it aids the quality of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects 'the primary effect,' as Schempp seems to require, are likely to be no more satisfactory than efforts to rank the legs of a table in order of importance.
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> Intervenors, in an effort to give shape to the *Schempp* test, have urged us to focus solely on the activity subsidized in judging effect. In other words,

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[85]See: 38 U.S. L. W. 2701 (June 9, 1970).
[86]—F. Supp. —, 39 U.S.L.W. 2023 (1970).

> intervenors propose that we examine only activities of the teachers receiving aid and ignore the religious nature of the schools in which they teach. Such a narrow perspective, however, strikes us as unrealistic when examining direct financial aid to denominational schools. The expenses of a religious institution may be apportioned in a variety of ways among its 'secular' and 'religious' activities. Under plaintiffs (intervenors) proposed test, sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to 'secular' activities . . .

The amici brief in the *Lemon* case places significant emphasis on the so-called *Walz* test. In calling the Court's attention to Judge Hastie's dissent in *Lemon,* Hastie is quoted as follows indicating support for Justice Goldberg's position in *Abington v. Schempp*[87] and that of Mr. Justice Harlan in *Board of Education v. Allen:*[88]

> . . . both express what I believe to be a sound rationalization that the First Amendment is violated by state action which will 'involve the state so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religious clauses of the First Amendment preclude.' I am unable to avoid the conclusion that the state undertaking authorized by Act Number 109 would thus intolerably involve the state in the realm of the sectarian.

Interestingly enough this argument by Judge Hastie anticipated the Supreme Court's decision in *Walz.* In that case, the court held that if the purpose of a law is to advance or support religion it is unconstitutional. It must be emphasized, however, that the court went on to say that, even if it is not its purpose, the law is still unconstitutional if the end result or effect is "an excessive government entanglement in religion."[89] It is important to recognize that the Supreme Court upheld tax exemption for churches because it involved less entanglement than would the removal of exemptions. But exemptions, the court pointed out, were constitutionally different from subsidies because the latter does involve entanglement. As the court explained:

> Granting tax exemption to churches necessarily operates to afford an indirect economic benefit and also gives rise to some but yet a lesser involvement than taxing them. In analyzing either alternative the questions are whether involvement is excessive and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative

[87] 374 U.S. 203, 248.
[88] 392 U.S. 236, 249.
[89] 90 S.Ct. at 1414.

> relationships for enforcement of statutory or administrative standards, but that is not this case. The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches; each relationship carries some involvement rather than the desired insulation in separation. We cannot ignore the instances in history when church support of government led to the kind of involvement we seek to avoid.[90]

The amici brief argues, and I would concur that, the Pennsylvania law in question in the *Lemon* case does encompass sustained and detailed administrative relationships for enforcement of statutory administrative standards. For example, the act in Section V imposes upon the State Superintendent of Public Instruction the responsibility for administering the statutory program. The law then defines "secular subject" whose teaching is subsidized to exclude "any subject matter expressing religious teaching or morals or forms of worship of any sect." This is found in section III. As Pfeffer points out in the amici brief in *Lemon*—

> But in seeking to avoid the Scylla of sectarianism the statutory plan is necessarily engulfed in the Charybdis of entanglement. There is simply no way of avoiding the former danger but by 'sustained and detailed administrative relationship' or, to put it in other words, by continued surveillance and policing.

The argument is rejected that the same sustained and administrative relationships are required in respect to public schools to prevent teachers from bootlegging sectarianism into biology or history or related courses. The critical difference lies in the fact that the First Amendment does not forbid "sustained and detailed administrative relationships" between secular government and a secular school system, but it does, however, forbid them between a secular government and a religious school system. It is worthy of special attention to note that in the *Walz* case the majority opinion by the Chief Justice[91] and the concurring opinion of Justice Brennan[92] stressed that tax exemption for churches went back to the days of the republic. Both Justices quoted the comment of Mr. Justice Holmes in *New York Trust Company v. Eisner*[93] that "a page of history is worth a volume of logic." The two justices also stressed the fact that tax exemption for churches is a universal practice in effect in every one of the states. The antiquity and ubiquity of tax exemption is strong if not conclusive evidence of its constitutionality.

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[90] 90 S.Ct. at 1414.
[91] 90 S.Ct. at 1415.
[92] 90 S.Ct. at 1418.
[93] 265 U.S. 345, 349 (1921).

In the *Lemon* case, however, the history and practice run in exactly the opposite directions. From the disestablishment of churches at the end of the eighteenth and the beginning of the nineteenth century until the enactment of the statute challenged herein neither the Federal Government nor any state has directly subsidized the operation of parochial schools. Just as the Constitution or laws of every state in the union authorized tax exemptions so do they universally forbid direct subsidization.[94]

At the time the amici brief in the *Lemon* case was presented, Leo Pfeffer emphasized that he knew of no case in any court in the United States—Federal or State—in which a law providing for payment of tax raised funds to a church to subsidize its parochial school operations had been upheld as constitutional. He recognized that there had been a number of cases where parochial schools, experiencing the financial difficulties faced by the parochial schools in present case, were purportedly transferred to the public school system under a plan whereby the parochial school premises were rented to the public school authorities and the teachers, usually nuns and priests, were employed *en masse* as public school teachers.[95] With but one exception[96] the arrangement was held unconstitutional in every case,[97] and even in that exceptional case, the plan's constitutionality was based on the factual finding that the school was no longer a parochial school but had, in fact, become incorporated into the public school system even though the nuns turned over their public school salary checks to the religious order to which they belonged. It would appear rather obvious that the Pennsylvania plan involved in the *Lemon* case and involving the Pennsylvania statute in question is merely a variation of these efforts and it can be argued persuasively that it is therefore equally unconstitutional. Nonetheless, it should be emphasized, of course, that the final word on the constitutionality of the Pennsylvania statute will come from the Supreme Court.

Pennsylvania's Response in Lemon v. Kurtzman

As might be expected, the brief of the State of Pennsylvania takes a strikingly divergent position from that presented by the

[94]"Catholic Schools and Public Money," 50 *Yale L. J.* 917 (1941); *Horace Mann League v. Board of Public Works*, 220 A.2d 51 (1966); as quoted in Pfeffer's amici brief in the *Lemon* case, p. 36.

[95]For an example of cases of this nature as well as reactions to it, see: Donald E. Boles, *The Two Swords*. Ames, Iowa, Iowa State University Press. 1967.

[96]*Johnson v. Boyd*, 217 Ind. 348 (1940).

[97]These cases are discussed also in: "Catholic Schools and Public Money," 50 *Yale L. J.* 917 (1941), Pfeffer, *Church, State and Freedom*, pp. 537-554.

amici brief just discussed. In essence, the conclusion drawn in the Pennsylvania brief can be simply put by noting that the State of Pennsylvania agrees that every issue raised by the appellants in this appeal was properly decided by the three judge district court. Therefore, they urged that the judgment entered by the U. S. District Court of the Eastern District of Pennsylvania be affirmed by the Supreme Court of the United States.

The brief points out that the district court in this case did not reach its decision in a vacuum. On the contrary, all parties submitted extensive briefs on the issue of standing and on the merits of the case. Additionally, the district court heard considerable and comprehensive oral argument on every issue. The State of Pennsylvania argued, that since it was a three judge district court convened pursuant to 28 U. S. C. 2284 which heard the case, the court considered only whether the act violated the First or Fourteenth Amendment as a matter of *law* based upon facial constitutionality and not upon possible maladministration of the act.

In doing so, the court found the decision in the *Allen* case[98] decisive in answering the First Amendment issues raised. And the state agrees with the district court's holding that the purpose and the primary effect of the law was to purchase educational services of a secular nature by nonpublic schools. Therefore, the state agrees that the purpose of the act was stated in the law itself: to promote the welfare of the people of the commonwealth of Pennsylvania and also to promote secular education for children attending nonpublic schools. This fact, they argued, has been sustained by the Supreme Court in 1968 in the *Allen* case.

Moreover, the state calls to the attention of the Supreme Court the findings of the lower court in which there was determined to be sufficient safeguards to insure that the authorized public funds would be expended only for secular purposes.

Also noted was the court's specific holding, according to the Pennsylvania brief, that the receipt of public funds by nonpublic schools themselves rather than by the children or their parents is constitutionally irrelevant in view of the fact that the children, like those in *Allen,* are the ultimate beneficiaries of the statute. Again it is emphasized by the state that no plaintiff, including the plaintiff *Lemon,* who was a black parent, had alleged that he was personally affected by any intentional discrimination or de facto

[98]392 U.S. 236 (1968).

segregation or that he had attempted to enroll his child in any of these schools and was denied admission because of race or religion. Consequently there was no basis for the court below to consider the plaintiff's contention that the act infringed upon the Fourteenth Amendment rights for the simple reason that no plaintiff satisfied the essential elements of standing to raise the issue. This was true even in Lemon's case where the court while granting the standing did not actually show any injury.

In coming to grips, in part, with several points raised in the dissenting opinion by Judge Hastie in the lower court, the state notes that Judge Hastie agreed with the majority that no plaintiff had established the requisite standing necessary to raise the Fourteenth Amendment issue. He would have denied the defendants' motion to dismiss plaintiff Lemon's complaint on the grounds that the statute violated the Establishment of the First Amendment clause, and the state's brief acknowledges that Judge Hastie's dissent demonstrates that he was clearly of the opinion that the primary purpose and effect of the law was religious. The brief also notes that there was a distinction between the Pennsylvania law, which was noted by Judge Hastie, and the New York act which had been upheld by the high court in the *Allen* case, because this law invites religious groups and organizations to act politically and involves the state intrusively in the affairs of religious institutions.

The state emphasizes the fact that the lower court found as a matter of law that the act provided adequate safeguards to prevent an establishment of religion and also the state agrees with the court's position that is properly restricted its inquiry to the face of the statute in determining whether its purpose and primary effect is to involve the state in the business of religion. It is further argued that the Pennsylvania law conforms in all respects to the neutrality doctrine as defined by the court in Everson,[99] *Board of Education v. Allen*[100] and *Walz v. Tax Commissioner of City of New York.*[101] In fact, the state argues that the statute specifically fulfills the requirement of *benevolent* neutrality as defined in *Walz* by equalizing the benefits of secular education for public and nonpublic school children. "The relationship created by the act between parochial schools and the Commonwealth is not one of interdependency; rather it is one of purchase and sale

[99]330 U.S. 1 (1947).
[100]392 U.S. 236 (1968).
[101]25 L. Ed. 2d 697 (1970).

of secular educational services." The State of Pennsylvania makes a major point of what it believes to be an underlying premise in the *Allen* case and which applies equally to the *Lemon* case at issue. That premise is that nonpublic schools, even if religiously oriented, perform a secular function which is and must be kept separate and apart from religious teaching. In fact, it is argued that the Pennsylvania statute, by expressly prohibiting the use of any public funds for religious instructions or form of worship of any sect, more effectively accomplishes that purpose than was set forth in the tax situation in the *Allen* case involving the New York law.

The state attempts to dismiss, out of hand, one of the key arguments in the briefs of the appellant by arguing that the fact that nonpublic schools are the payees under the act is of no constitutional significance. The important factor, as the state sees it, is that this statute, like the one in *Allen,* makes the students the primary beneficiaries of public funds.

At a number of places in the Pennsylvania brief, considerable emphasis is placed on the fact that what is postulated by the appellants is an "iffy" situation and, in point of fact, no statute could be upheld if the problem of possible maladministration of it is taken as a key to its constitutionality prior to the existence of examples of maladministration. Thus, Pennsylvania argues that the appellant's challenge, based on the Fourteenth Amendment, is not directed toward facial constitutionality but toward possible maladministration, which question should properly be remanded to a single judge district court. Accordingly, even if the three judge court deciding the case were to find that some petitioner had the requisite standing to raise the equal protection issue, this is not the proper procedure to decide that issue in the present case; thus, the state argues in support of the district court's findings.

The state readily agrees that the Establishment clause of the First Amendment prohibits states from setting up a church or supporting religious activities of sectarian institutions. On the other hand, it is pointed out that it is conclusively determined that a state may not exclude persons, on account of their religion, from the benefits of public welfare legislation and must be neutral in its relations with groups of religious believers and nonbelievers.[102]

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[102] 330 U.S. 1 (1947).

Quoting the early case of *Cochran v. Board of Education,*[103] the state notes that the Supreme Court has consistently upheld state legislation in which governmental responsibilities are generally performed, even though religious schools derive some incidental benefits. Moreover, Pennsylvania emphasizes that the court, in its recent pronouncements in the *Walz* case,[104] made clear that the concept of neutrality in this area is not absolute and that, therefore, each statute must be carefully examined to determine whether the doctrine of neutrality has been violated. It is noted that "The problem, like many problems in constitutional law, is one of degree."[105]

One general principle, however, the state argues, serves as a guideline for interpretation:

> . . . we will not tolerate either governmentally established religion or governmental interference with religion. Short of these expressly prescribed governmental acts there is room for play in the joints productive of a *benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference.[106]

This prompts the state to generalize that it is highly significant that the *Walz* opinion supplements the previously described neutrality doctrine in a dramatic way. As set forth above, the neutrality required of a state in the First Amendment area is now described as *"benevolent neutrality."* The Pennsylvania act, it is argued, accomplishes precisely this objective within properly regulated and defined limits. That is, each student in primary or secondary school (assuming that the school meets the quality standards established in the act) is now entitled to the same benefits of quality secular education.

The court in the *Walz* case, the state argues, looked for the primary effect of the act and concluded that such effect was manifestly secular. Moreover, as Chief Justice Burger recognized in *Walz,* the loan of textbooks in *Allen* logically must be considered an "aid" because it relieved the participating religious schools in New York of a substantial financial burden. But the state emphasizes that the court in *Walz* did not "construe the religion clause with a literalness that would undermine the ultimate constitutional objectives as illustrated by history."[107]

The Pennsylvania brief in the *Lemon* case deals next with the

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[103] 281 U.S. 370 (1930).
[104] 25 L. Ed. 2d 697 (1970).
[105] See: *Zorach v. Clauson,* 343 U.S. 306, 314 (1952); and *McGowan v. Marland,* 366 U.S. 420 (1961).
[106] *Walz v. New York City Tax Commission,* 25 L. Ed. 2d at 702.
[107] *Ibid,* at 705.

"excessive entanglement" doctrine of the *Walz* case. The brief quotes the court's words in *Walz* when it said:

> Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the injury, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree . . . the questions are whether the involvement is excessive, and whether it is a continuing surveillance leading to an impermissible degree of entanglement.[108]

Pennsylvania argues that in this case, as in the Allen case, it would be absurd to hold that the inclusion of specific safeguards in the act, which are further limited by regulation, make the statute unconstitutional. On the contrary, those very safeguards make this act constitutional since they guarantee that the secular is totally segregated from the religious. As the state of Pennsylvania viewed the Walz opinion, it concluded that the decision indicated that religion is an important element in our society. Therefore, the Supreme Court's concern should not be whether religion has been incidentally aided. On the contrary, the state argues, the test is whether it has been an establishment of religion to such a degree that religion becomes the state's business.

No attempt is made to deny that this act creates a contractual relationship between the participating schools and the common law of Pennsylvania. This is not the type of day-to-day relationship, however, which Mr. Justice Burger discussed in *Walz*. The relationship created is simply one of purchase and sale of secular educational services. On the one hand, the Commonwealth of Pennsylvania receives quality secular education; on the other, the contracting schools receive the necessary funds to provide that quality secular education.

How the state of Pennsylvania envisions the *effect* of the statute is the upper-most consideration. If the effect is to create an excessive government entanglement with religion, then the statute must fall. However, the state argued that if its effect is to promote a secular purpose, then the statute conforms with the dictates of the First Amendment as enumerated in the decided cases, and must be upheld.

One of the most notable disagreements along procedural and jurisdictional lines between the appellants' brief and that of the state is the argument over the role of legislative history and intent, and its effect upon judicial decision-making. The appellants' argued

[108] *Ibid*, at 704, 705.

vigorously that the court, including the federal district court, must examine the legislative history of the statute in order to ascertain the "true intent of the legislature." In point of fact, the district court refused to do so on the grounds that the statute was clear on its face and the intent of legislature, if that intent must be considered, is to be found in the legislative findings contained in the law. Needless to say, the state of Pennsylvania agrees with the lower court determination as being totally proper, in view of the law, on the long standing principle that, absent some ambiguity, a court should only consider the express language of the statute. This they argue is what the Supreme Court did in the *Allen* case and was the precedent that the federal district court in Pennsylvania correctly followed. The federal district court recognized the importance of the role of legislative intent and relied upon the language of Justice Frankfurter in McGregor v. United States.[109] Frankfurter said:

> The private and unformulated influences which may work upon legislation are not open to judicial probing. 'The decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.' Inquiry into the hidden motives which may move (a legislature) to exercise a power unconstitutionally conferred upon it is beyond the competency of courts.'[110]

The Pennsylvania brief in the *Lemon* case thus concludes, "A court is not justified in attributing improper motives to a coordinate branch of the state government as the bases for invalidating a state statute."

It is important to note that there is a most fundamental difference of judicial theory involved here which has been a cause of persistent debate concerning the theory of judicial self-restraint in the Supreme Court, almost from the beginning of American History. The court very early recognized that it would not look into the motives of the legislature.[111] Over the years, however, the court was equally clear that there is a difference between the *motives* which prompt a legislature to pass legislation and the *intent* of the legislature. The *intent* of the legislature the court has consistently held is a proper area for courts to investigate. Indeed, one rather basic legal premise of the court is that on matters of statutory interpretation the Supreme Court typically addresses itself first to the intent of the legislature. This is evident in a variety of cases

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109 195 U.S. 27, 56.
110 *McGowan v. Maryland*, 366 U.S. at 496.
111 *Fletcher v. Peck*, 6 Cranch 87 (1810).

concerning the so-called separability clauses,[112] where the court has been unwilling, under most circumstances, to accept on the face such an obvious statement of intent as the typical provision in a statute which stipulates that if it is the intent of a legislature that if one section of a statute is held unconstitutional, the remaining sections should continue to operate and have the effect of the law.

The Pennsylvania brief before the Supreme Court in the *Lemon* case emphasizes repeatedly the similarity in the case of *Allen* and that of the *Lemon* case, and that the earlier case's principles are controlling factors in the present case. The concept argued is that public funds are being used solely for the purpose of providing *secular* education services to nonpublic schools. Moreover, the brief in this connection points out that the Supreme Court had observed in *Allen* the fact that it was proper and possible for a religiously affiliated school to keep these two functions separate, a point made substantially earlier in Pierce v. Society of Sisters.[113] Pennsylvania here acknowledged that the Supreme Court in the *Allen* case recognized that textbooks might differ from bus transportation in a constitutional sense if public funds were expended to provide *religious* books for New York school children. The Court found, however, in fact, that only secular books could be loaned under the New York Act and consequently rejected the contention that the loan of textbooks inevitably advances the teaching of religion.

A point made much of by the appellant, namely that a key problem involves the purchase "reimbursement-method" contrary to the "loan method," is dismissed out of hand in the Pennsylvania brief. As the state approaches this question they conclude the fact that a "purchase-reimbursement" method is used rather than the "loan" method is a distinction without a difference and is of no constitutional significance. Similarly, the state argues that the purchase of the services of the teachers instructing the students in these secular courses provides no more than the medium through which textbook knowledge is imparted to the student.

It has been pointed out earlier that the appellants argued that the district court erred in applying the Supreme Court's "purpose and primary" effect test by only considering facial constitutionality of the necessary effect of the statute's administration. The court classified as a conclusion of *law*, the allegation that the pur-

[112]See for example: *U.S. v. Caroline Products Co.*, 304 U.S. 144 (1938), especially Mr. Justice Stone's famous footnote at 152-153; also Felix Frankfurter, "Some Reflections on the Reading of Statutes," 47 *Columbia L. Rev.* 527-46 (1947).

[113]268 U.S. 510 (1925).

pose and primary effect of this act was to aid religion. The state of Pennsylvania feels that the court justifiably found it unnecessary to permit discovery and testimony on the *establishment* issue, because of the position of the United States Supreme Court in the Allen case on this subject.

At best, the appellants, it is argued, could have demonstrated that only the administration of the act by seven defendant school districts violated the establishment clause. The position of the state of Pennsylvania is that the district court was correct, since in the interest of judicial economy such questions of application should be left to a single district judge rather than the three judge panel convened in the *Lemon* case to decide the constitutionality of the Pennsylvania law. On this basis, Pennsylvania argues that the federal district court was correct to view the petitioners allegation of unconstitutionality as a conclusion of *law* which need not be admitted for the purpose of testing the sufficiency of the complaint on a motion to dismiss.

There is no doubt that the state of Pennsylvania is concerned about the basic and classical legal tradition in this country concerning the law of separation of church and state. It argues in its brief that the Nonpublic Elementary and Secondary Education Act of Pennsylvania is in no way violation of this long standing legal tradition. Pennsylvania argues that to extend the benefits provided under the act merely insures that only the actual costs of the authorized secular education services will be paid to the private schools.

As in *Everson,* the state argues, the actual cost of performance is payable only *after* the service is performed satisfactorily. Accordingly, this method is not a direct grant or subsidy to religious institutions which might be applied to some unauthorized use. On the contrary, Pennsylvania argues that this "purchase of services" method prevents the use of state funds for the expansion of facilities or for another use that could predominantly improve the religious institution.

In answer to the appellant's repeated argument that a state may not have any semblance of a working relationship with the religious school because to do so would *ipso facto* be a law "respecting an establishment of religion," Pennsylvania argues that such a view runs directly counter to the Supreme Court's decision in the *Allen* case of 1968. There the New York act extensively regulated the attendance and curriculum of New York private schools. In fact,

the underlying principle of the *New York Education Law* was that the instruction given in private schools satisfying the compulsory attendance law be "at least substantially equivalent to the instruction given to minors of like age and attainments in the public schools of the city or district where the minor resides." The state's brief in the *Lemon* case insists that the Allen decision makes clear that each state may regulate the minimum hours of instruction, the qualification of teachers, and the quality of the subject matter of instruction in nonpublic schools.

Another point which the appellants emphasize consistently is the fact that the nonpublic schools are the payees under the Pennsylvania statute. This fact, the state argues, is of no constitutional significance. The federal district court, it is argued, never held that the funds must actually be paid to the student or his parents; indeed the brief points out what the court said on this subject:

> The child and society generally certainly benefit from the improvement of secular education the child received regardless of whether there is a direct payment or loan to him or to his parent or to his school or teachers.[114]

Pennsylvania goes further and argues that constitutional differences should not be resolved upon the basis of such a technicality as how the states individually view the problem. The *Allen* opinion implicitly recognized that when the court upheld the constitutionality of the New York law, despite the fact that parochial schools ordered and stored the textbooks before furnishing them to the students, and this is certainly adequate to cover the Pennsylvania situation in which no such extreme activities were, in fact, followed.

Indeed, the state notes that the federal district court in the *Lemon* case held that the situation, as just pointed out in *Allen,* was not the case here, where "state supported public school buildings, facilities and teachers are used as form for the dissemination of religious doctrine at times and on occasions when pupils are subject to state compulsory attendance law."[115] Pennsylvania argues that the common factor in *McCollum, Vitale,* and *Schempp,* which were cases involving religious oriented practices struck down by the Supreme Court, involved situations where the state's intent either expressly or by tacit consent was to involve itself in the business of *religion.*

The test of purpose and time, in fact, has been met, the Pennsylvania brief insists. The purpose of the act is the secular education

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[114] *Lemon v. Kurtzman,* 310 F. Supp. 35, 47-48 (1969).
[115] *Ibid,* at 47.

of children—a valid state interest, and it primary effect is neither to advance nor inhibit religion, but rather to strengthen the quality of secular education. Procedurally, a point that is hit on a number of occasions in the brief of the state of Pennsylvania is the fact that the appellants at no time alleged in what manner they were coerced in the practice of their religion. The pleadings are silent as to what particular religious beliefs were affected by the act. In short, the plaintiffs had not demonstrated that this act in any way affected them in the exercise of any religious or devotional activity. On this same line the state agrees with the federal district court that the organizational appellants had no standing to maintain an action under the First or Fourteenth Amendment. They refer to the famous test fashioned by Mr. Chief Justice Warren which defines the specific elements necessary for standing in taxpayer suits brought under the establishment clause. Quoting Mr. Chief Justice Warren the brief notes:

> . . . a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional question (is indispensable).

In addition the *Flast* rule requires each plaintiff to demonstrate some *adverse legal interest* which he is seeking to protect. Initially the state of Pennsylvania points out there was no allegation that these organizations were even taxpayers. Furthermore, the appellants do not and did not allege that they had suffered any specific injury. In this sense it is suggested that the organizational appellants in this case are similar to the appellants in the *Doremus* case[116] where apparently the sole and only function of the plaintiff was that they assume the role of actors so that there might be a suit which would invoke a court ruling upon the constitutionality of the questioned statute.

In attacking this particular stratagem of the appellant the state's brief suggests that they are apparently relying in this procedural approach upon a novel theory of the "private attorney general" advanced by professor Louis L. Jaffee of the Harvard Law School.[117] This theory, the state argues, is based principally upon the interest which an organization allegedly has in a particular public issue and not upon any specific injury which the organization might have suffered. While this theory may have some pedagogical ap-

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[116] *Doremus v. Board of Education*, 342 U.S. 492 (1952).

[117] See: "Standing for Secure Judicial Review: Private Action," 75 *Harvard L. Rev.* 255 (1961).

peal Pennsylvania contends, it is directly contrary to the opinion of the Supreme Court on the subject of standing.

In addition to the requirements just stipulated in *Flast,* the state argues that the Flast doctrine demands a showing of two additional essential elements: 1. The taxpayer must establish a logical link between the status asserted and the legislative enactment attacked; and 2. The taxpayer must establish a nexus between the status and the precise nature of the constitutional infringement alleged.[118] Pennsylvania goes even further to insist that even on the base of the pleadings in which the appellants failed to allege a logical nexus between the status asserted in the claim sought to be adjudicated, the district court promptly concluded that no standing has been established on either the religious issues or the equal protection issues involved.

On the subject of the lower court's findings that *Lemon* had standing to attack the statute on First Amendment grounds, the state agrees with the district court. However, it argues against the position taken by the appellant in his brief before the Supreme Court, namely that the holdings in Sherbert[119] and Torcaso[120] are not controlling in the present case. The majority opinion of the court assumed that the individual plaintiffs, other than Lemon, refrained from attending horse races so that they would not contribute to the teaching of religion. But interestingly enough the state of Pennsylvania argues that Chief Justice Hastie in his dissenting opinion correctly noted:

> . . . the complaint contains no factual allegation that these plaintiffs desire to go to the races and have been deterred by reason of the known application of the racing revenues to the purpose of Act No. 109, and none of the individual plaintiffs has alleged any particular religious belief or any effect of Act No. 109, on the practice of a particular religion.[121]

Furthermore, the state argues there is no merit to the theoretical argument that *all* taxpayers are affected by this act on the ground that the revenues generated by horse racing could have been applied to some general use. Again quoting Chief Justice Warren on the subject of "affected class" in the Flast decision: "(where a challenged tax affects) a particular class of taxpayers . . . the proper party emphasis in the federal standing doctrine would require that standing be limited to the taxpayers *within* the affected class."[122]

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[118]Flast, *Supra,* at 101-102.
[119]*Sherbert v. Verner,* 374 U.S. 398 (1963).
[120]*Torcaso v. Watkins,* 36 U.S. 488 (1961).
[121]310 F. Supp at 54.
[122]392 U.S. at 104.

Finally, on the point in which the district court found no appellant had standing to challenge the Pennsylvania law on Fourteenth Amendment grounds, the Pennsylvania brief, while approving the court's stand, here goes on to explain and justify the court's position in the following fashion. It notes that the appellants alleged that de facto racial segregation existed in the appellee's school and that under the state law it would be perpetuated and supported by public funds. But on the face of the complaint it fails to meet the standing requirement which is spelled out in the *Flast* case. That is, no appellant alleged the requisite "personal stake in the outcome of the controversy" sufficient to permit him to bring suit. Petitioner Lemon, it is true, alleged that he is a negro whose child attends a public school in Pennsylvania. However, the federal district court noted and the Pennsylvania brief reiterates the following:

> . . . There is no allegation in the complaint which asserts that Lemon's child attempted to enroll at any contracting school and was denied admission because of race or religion . . . Race is indeed relevant consideration to equal protection issues. However, our research does not disclose any case in which a person was permitted to challenge discriminatory practices, policies or laws *where he himself was not the object of such a practice.*[123]

There is no basis, the Pennsylvania brief argues, for even an inference, that as a matter of law, the act excludes from admission or otherwise discriminates against persons by reason of race. By adding the Fourteenth Amendment issue to the First Amendment challenge, the appellants ask the court to speculate that the act may some day produce some form of discrimination. But the basic issue for adjudication cannot be whether the act might be administered in an unconstitutional manner, because the possibility or probability of such maladministration cannot nullify a statute; otherwise no statute could ever withstand the constitutional challenge on equal protection grounds.

One major issue to which this brief does not address itself, or carefully ignores, is the fact that in a variety of instances in the South, private schools have been established, some with subtle and others with not so subtle grants of public funds for the sole purpose of maintaining a segregated school district based on race.

In essence, of course, what the Pennsylvania brief in the *Lemon* case does is simply attempt to bolster the decision of the federal district court and to urge the importance of *standing* as a proce-

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[123]See for example: *Burton v. Wilmington Parking Authority*, 365 U.S. 716 (1961); *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), cert. den. 376 U.S. 938 (1964).

dural factor of major importance before the Supreme Court of the United States.

Lower Federal Courts and Federal Aid Programs to Private Education

The present time is notable for the variety of cases being adjudicated in state and federal lower courts concerning various aspects of the *Elementary and Secondary Education Act,* as well as other federal aids to education which may be utilized to assist private and parochial education. Indeed, things are occurring so rapidly in this area that as you read or hear this presentation some of the points made may be in the process of being accepted, corrected or overruled. Again nothing today in the field of public law provides such thin ice on which to skate as do queries concerning additional attitudes toward federal aid programs to private and parochial schools.[124]

The Federal Higher Education Facilities Act.

One of the cases that seems destined to rank in importance with that of the *Lemon* case presently before the Supreme Court is that of *Tilton v. Richardson.*[125]

This case, while docketed shortly after that of *Lemon* by the Supreme Court, involves at least as important considerations as does the *Lemon* case in that it is dealing with various federal aids to operational facilities of parochial schools.

In the *Tilton* case and a closely related case, *DiCenso v. Robinson* along with the similar case of *Johnson v. Sanders* on October 15, 1970, in the United States District Court of Connecticut, the whole question of federal aid to building programs of parochial universities and colleges was held at issue.[126]

In the *Tilton* case, for example, the *Higher Education Facilities Act* authorized grants to "institutions of higher education of federal funds for constructions of their academic facilities." Pursuant to the act, a sectarian college in Connecticut was granted aid and plaintiffs brought suit, contending such aid to a sectarian institu-

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[124]For recent cases of this nature in Louisiana, see: *The Christian Science Monitor,* November 13, 1970; for Michigan's recent referendum on "Parochiaid," see: *The Sunday News,* Detroit, Michigan, November 1, 1970.

[125]U.S. D. C. Conn., 312 F. Supp. 1191 (1970), docket No. 1555.

[126]*DiCenso v. Robinson,* ——*F. Supp.* ——, 39 U.S.L.W. 2023 (1970, and *Johnson v. Sanders,* ——F. Supp. ——, 39 U.S.L.W. 2225 (1970).

tion was: 1. Forbidden by federal law and 2. A violation of the Establishment clause of the First Amendment.

The issues in the *Tilton* case were relatively simple. First, does the Federal Facilities Act authorize such utilizations of funds to sectarian institutions? Second, does such authorization violate the Establishment clause or the Free Exercise clause of the First Amendment?

The Federal District Court of Connecticut held for Richardson or the government, and its rationale might be summarized as follows. The Act, the court felt by its terms, neither included nor excluded church related institutions as such. It did, however, define "institutions of higher education (without regard to whether it is church related or not) as an institution which is nonprofit, and accredited by the state in which it operates. Since church related colleges and universities may meet these criteria, the court concluded such institutions may be eligible for grants under the federal act.

Moreover, the federal law prohibited grants to any facility to be used for worship or sectarian instructions, or to be used in a program of a school or department of divinity. These limitations, the court concluded, made it clear that the federal law was intended to include sectarian institutions which met the former criteria and which were free of the latter limitations. Additionally, the federal law's legislative history made it more than clear that aid to sectarian institutions was contemplated and intended.

The Supreme Court at this juncture has not ruled on the precise issue involved in this case but the federal district court in two national cases is shedding light on the problem. These cases were *Everson v. The Board of Education* and the *Board of Education v. Allen.* In the district court's judgment, these two cases were brought to test the constitutionality of the question which was: What is the purpose and primary effect of the legislation? If either is the advancement or aid to religion, the legislation must fail. This is, of course, a conclusion rather than an issue.

Based on a positive declaration of policy to increase the capacity of the nations' institutions of higher education, the lower federal court held that this act pursued the purpose of the congressional intent. One such purpose was an attempt to fulfill an urgent public need. The second purpose was that the act did not have the purpose of promoting religion.

The federal statute in question, as the district court saw it, was carefully designed to insure that federal funds were allocated to only the secular functions of otherwise sectarian institutions. In addition, the court held there are other provisions and administrative regulations insuring that such facilities constructed with federal grants will be used only for secular as contrasted to sectarian purposes. The federal district court held that the federal act had a primary effect which neither advanced nor inhibited religion.

Finally, the district court concluded that the statutory enactment did not abridge the Free Exercise clause of the First Amendment, unless it could be found that the statute had adverse effect upon the individual by inhibiting the practice of his religion. Plaintiffs, the court concluded, did not show that the act coerced them as individuals in the practice of their religion in any way whatsoever.

On the basis of such findings, the court enunciated several rules of law. The act did authorize the utilization of funds for sectarian institutions under the constraints and limitations as set forth by the court. In addition, the lower court found that such authorizations of funds for construction for sectarian institutions of higher education did not violate the Establishment clause or the Free Exercise clause of the First Amendment, on the basis of the stipulations spelled out in a variety of recent decisions.

Related Cases on Federal Aids

Of the most recent cases, *DiCenso v. Robinson* emerges as a primary example of another view taken by the lower federal courts. The three judge district court, with Judge Coffin speaking for a unanimous court, found the facts to be that a Rhode Island statute providing monetary assistance to nonpublic school teachers of secular subjects violated the Establishment clause of the United States Constitution on the grounds that the state statute provided state funds to nonpublic school teachers for secular subjects.

The court reasoned, in its unanimous decision, that the objective of this statute was to enable nonpublic schools to complete effectively for teachers in light of the financial crisis facing the parochial schools. However, the court held the school system is an integral part of the religious mission of the Roman Catholic Church and it may be extremely difficult to draw a clear line between sectarian instruction and that instruction of a totally secular nature. As the Rhode Island Court saw it, the appropriate standard to be used in the case is the "purpose and effect" test laid down by the

United States Supreme Court in *Schempp*. Applying this test, the district court in Rhode Island concluded that it is clear that the purpose of the state law was neither to advance nor to inhibit religion and the quality of education in the nonpublic schools is a legitimate legislative concern.[127]

As the Rhode Island district court analyzed the situation, it concluded that it was more difficult to determine the statute's primary effect. The arguments, as it viewed the situation, centered around the meaning of the word "primary." The court concluded that this distinction was critical since the statute had two significant effects. One, it aided the quality of secular education; and two, it provided support to a religious enterprise. If the "primary" means essential or fundamental to the statutes constitutionality without which it could not exist, the statute must fall. However, the court concluded if the statutory language meant "first in order of importance" the statute stands.

These deficiencies in the *Schempp* case were recognized in the *Walz* case.[128] In the opinion of the Rhode Island court, the *Walz* case defined the Schempp doctrine by moving the focus away from a search for "primary effect" and its meaning to whether the statute fosters entanglement between government and religious institutions, and whether the degree of entanglement is likely to promote the substantive evil against which the First Amendment guards.

Under the Rhode Island statute the federal district court of that state concluded such entanglements would occur. The educational commissioners, in the court's judgment, were required to monitor parochial school expenditures and in close cases determine which spending was of a religious nature and which expenditures were of a secular sort. Therefore, the state statute promoted an involvement that might seriously limit the internal freedom of the parochial schools, as well as constituting a direct subsidy which created an administrative involvement between church and state.

It is clear that this is a matter of such immediate and topical importance that it is impossible for one to explain the rationale of the Supreme Court decision regarding the application of the Establishment clause and the Freedom of Religion clause of the First Amendment as it applies to the Elementary and Secondary Education Act and to the Federal Education Facilities Act. The significant point to keep in mind is that one must, if in a position of public school

[127] *DiCenso v. Robinson, Supra.*
[128] 90 S.Ct. 1409 (1970).

authority, watch the daily newspaper and Law Week as a hawk watches a field mouse, to determine precisely what type of directives, information, and suggestions to offer his school policymakers and the teachers under his authority.

State Cases Pending

There is no space in this study to do more than cover perfunctorily the cases before state courts at the present time or which have just been recently settled and may be in the process of appeal to the Supreme Court of the United States. It is important to note the diversity and the quality of the litigation that presently is pending or has just been decided at intermediate levels on the subject of church-state relations as they affect the school system of the United States. Again it must be emphasized that there is no definite answer to whether or not the Supreme Court will be eventually willing to accept these issues and decide them on the merits, or for that matter, whether these cases will, in fact, be appealed beyond the highest state court of appropriate jurisdiction.

The issue of school bus transportation to nonpublic schools is by no means dead, as revealed by cases in both Hawaii and Minnesota in the past year or two. For example, the high court of Hawaii held in the *Spears* case[129] that the Hawaii statute which provided for bus transportation, in fact, subsidized sectarian and private school students and, as such, violated the Hawaiian constitutional prohibition against the use of public funds for the support and benefit of any sectarian or private educational institution. In so doing, the high court of Hawaii rejected the so-called "child benefit" theory. It was clear from the proceedings of the constitutional convention of Hawaii that the framers of the Hawaiian constitution specifically rejected the child benefit theory, the Hawaiian court held, as it specifically applied to bus transportation and similar welfare programs. This, the court held, is due in a large part to the peculiar context of the state's constitutional history.

The *Everson* case accepted as controlling the state laws and constitutional provisions concerning bus transportation as it may or may not violate the First Amendment but the Hawaiian Constitution and laws prohibited this. Therefore, *Everson* was not binding on that State. As the high court of Hawaii concluded, Hawaii's constitution is unlike the New Jersey Constitution in that the

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[129] *Spears v. Honda*, 449 P.2d 130 (1968).

Hawaiian Constitution prohibits the use of public funds for parochial bus transportation.

A most recent case on the same subject was grappled with by the high court of Minnesota.[130] In this case the facts involved a Minnesota statute under which the school board of District 622 passed a resolution authorizing transportation of nonpublic school children to nonpublic school. The cost is divided nearly evenly between the state funds and the school district tax revenue. The plaintiffs brought the suit on the grounds that the statute violated the First Amendment of the United States Constitution and Article 8, Section 2 of the Minnesota Constitution. The state constitution specifically prohibits the use of public money for the support of parochial schools. The issue obviously was whether the Minnesota statute, permitting school boards to use funds in the fashion in which District 622 had utilized them, violated the Establishment clause of the First Amendment and the pertinent clause of the Minnesota Constitution. The Minnesota court upheld the validity of the action of the school board.

As the Minnesota court saw the question, it involved the issue of the violation of the federal constitutional prohibition by the busing of parochial students, an issue resolved in the *Everson* case. The Supreme Court of Minnesota, however, noting all due respect to the constitution, concluded that a better argument could be made that the statute violated the clause forbidding support of parochial schools.

Looking to the precedent of other states, however, the Minnesota court found that the thrust of decisions is "whatever support is given to sectarian schools is incidental and that children and their parents are the real beneficiaries." Thus, the Minnesota court concluded that the state law permitting school boards to utilize public funds for transportation of parochial school students to parochial schools was constitutional. The court, however, did so with the conviction that this legislation brings us to "the brink of unconstitutionality."

Moreover, the court pointed out that though the legislature may have been well motivated by a desire to prevent the additional tax burden which would result from a closing of the parochial schools, the court felt that the statute may be upheld as the safety measure which it purports to be, and thus avoids the violation of the First

[130] *American United, Inc. v. Independent School Board No. 622*, 179 N. W. 2d 146 (1970).

Amendment clause to the United States Constitution and Section 8 of the Minnesota Constitution.

Use of Public Funds for Private School Instruction

A number of states, particularly in the East, have been forced to grapple with the question of the use of public funds for the construction of classroom buildings or related edifices, on the grounds that this may violate federal or state constitutional prohibitions against the use of public funds for private or sectarian purposes.

For example, the Vermont court was faced with a question of whether or not a Vermont statute providing for the creation of the Vermont Educational Building Financing Agency, whose purpose was primarily to provide funds for the construction of classroom buildings for nonpublic secondary schools, violated the Establishment clause of the First Amendment.[131] The court upheld the Vermont Educational Building Financing Agency Act. Its reasoning ran somewhat as follows: The Chancelor's findings indicated that the trustees of the colleges in question were entirely independent of the Diocese, and that the Church had no control over the board. The relationship was one of affinity rather than domination, the Vermont court concluded. This is in contrast to Swart v. Burlington School District[132] where the school was controlled and supported by the church.

Applying the purpose and effect test of the *Schempp* case, the Vermont court record showed that there was no primary effect that advanced or inhibited religion. The court also observed that, in the assistance offered by the plaintiff, there was no such suggestion. As it viewed the matter, "the mere fact that public funds are expended to an institution operated by a religious enterprise does not establish the fact that the proceeds are used to support the religion professed by the recipient."[133] Thus, the Vermont court majority concluded that the grant of financial assistance to a church-related but not dominated college for the construction of classrooms and science buildings pursuant to the Vermont statute did not violate the First Amendment's Establishment clause.

There was a dissenting opinion in this case by Judge Smith, who pointed out that the action before the court resulted in a direct benefit to the sectarian school in the acquisition of new buildings,

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[131] *Mann v. Vermont Educational Buildings Financing Agency*, 247 A. 2d 68 (1968), appeal dismissed pursuant to Rule 60, July 1, 1969.
[132] 122 Vt. 177.
[133] *Cochran v. Louisiana*, 281 U.S. 370, 375 (1929).

not to the students nor to their parents. Judge Smith observed that as such, it will inevitably result in the advancement of the particular religious culture which is the school's stated educational purpose. This clearly constituted a violation of the Establishment clause of the First Amendment, as Smith saw it.

A related issue confronted the New Jersey Supreme Court in the case of *Clayton v. Kervick*.[134] With Chief Justice Weinstraub speaking for the court, the fact situation was explained in the following fashion. A New Jersey statute created the New Jersey Educational Facility Authority which was authorized to sell bonds to private sources and repay with interest gained by the use of such money. The state law did not provide for grants of gifts but merely for loans on a self-sustaining basis. The state authority was authorized to lend money to private institutions of higher learning or to rent building facilities on land conveyed to the state authority by the parochial institution. In return, the improved property was returned on lease to the private educational institution and the institution recovered the title to the property upon full performance of the lease. Since the bonds and property of the New Jersey Educational Facility Authority are tax exempt the cost of such buildings are notably reduced.

The New Jersey law was challenged as a violation of the Establishment clause of the First Amendment and of Article I of the New Jersey Constitution which stipulates that "There shall be no establishment of one religious sect in preference to another."

The court held for Kervick and upheld the statutory authority against the constitutional challenge. It reasoned that since the state provision is less pervasive than the federal, discussion may be limited to the Federal Constitution. Using the test derived in *Schempp*, the court found the situation in the present case to be quite distant from the forbidden line spelled out there. The line, as the New Jersey court saw it was:

> If the state may thus provide services, police, fire protection to a purely sectarian interest when the supporting revenues are obtained by general taxation of the property of others it should follow the governmental services sustained by revenues paid by the users may be offered to sectarian institutions for a light charge.

The high court of New Jersey did not deny that a sectarian institution might derive a benefit from the services provided under the act by way of reduced costs in obtaining buildings through tax-

[134] 267 A. 2d 503 (1970).

exempt bonds. But the fact remains that the benefit is incidental, the court held, and the incidental quality of the benefit saved it from the constitutional prohibitions of the First Amendment.

Recently, the New Hampshire Supreme Court was also called upon to issue an advisory opinion on a related matter.[135] The New Hampshire Supreme Court pointed out that the state constitution bars aid to sectarian activities and schools and institutions of religious sects or denominations. However, the court felt that since secular education serves a public purpose, it may be supported by tax money if sufficient safeguards are provided to prevent more than incidental or indirect benefits to the sect or denomination. To withstand the strictures of the Establishment clause, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion, The court here noted the *Schempp* case[136] and the *Allen* case.[137] The conclusions of the court were first, that the bill permitting a real estate tax exemption would produce unconstitutional discrimination since it would make available funds that could be contributed directly to nonpublic schools without restricting the aid to secular education. Second, the court concluded that the bill authorizing the school board in its discretion to furnish transportation for pupils attending nonpublic schools outside the district was likewise of doubtful constitutionality. This was the case because the bill delegated undefined discretion to the school board and discriminatory application could easily result, the court felt.

On the other hand, the court found the provision including the number of children attending nonpublic schools in the base for computing foundation aid was constitutional. The primary purpose, as the court saw it, was to encourage and help support those public services to nonpublic school pupils which the school district may constitutionally furnish, even though it may reduce to some extent the real estate taxes paid by all taxpayers and thereby *incidentally* free money for those having children in nonpublic schools.

The New Hampshire court concluded that the bills which would authorize the furnishing of medical personnel guidance services and textbooks were also constitutional. The textbook loaned or sold would, of course, be confined to those required for use in the public schools. In summary, the advisory opinion of the New Hampshire

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135New Hampshire Supreme Court, Opinion of the Justices, 258 A. 2d 343 (1969).
136374 U.S. 203.
137392 U.S. 236.

court suggests that the proposed New Hampshire law which included nonpublic school children in the base for computing aid to school districts and furnishing medical personnel, guidance service, and textbooks to nonpublic schools would not violate the Establishment clause of the United States or the New Hampshire Constitution. But laws providing $50.00 property tax exemption for persons with children attending nonpublic schools and providing in the discretion of the local school board, transportation to outside districts for nonpublic school students would violate both the state and national constitutional provisions.

Maryland also faced the problem of the questionable constitutionality of providing public funds for construction of buildings for church affiliated colleges.[138] Under the Maryland law, grants for construction of dormitories and classroom buildings were given to church affiliated colleges. Plaintiffs in these cases argued that such grants violated the First Amendment's Establishment clause. The issue obviously was: First, are grants "to sectarian" colleges and universities prohibited by the Establishment clause of the First Amendment and second, what are the criteria for determining whether a particular institution is sectarian.

The court held for Mann and ruled that the Maryland grant for construction to sectarian colleges and universities was prohibited by the First Amendment's Establishment clause.

Its rationale essentially pointed out that to establish a First Amendment violation it must be demonstrated that the statute resulted in the use of the state's coercive power to aid religion. It is primarily a question of degree, the court emphasized, as to how far all religious or a specific religion may be benefited by state action without the state outstepping its neutrality. It follows rationally, the court observed, that the present statute's benefit to religion is determined by the degree to which the institution is "sectarianized." In determining whether an institution is sectarian or not, the following criteria are significant, the Maryland court noted. First, the stated purpose of the institution. Second, the college personnel (governing board, administration, faculty and students). Third, the college's relationship with the religious organization. Fourth, the place of religion in the college's program. Fifth, the result or outcome of the program. Sixth, the work and image of the college in the community.

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[138] *Horace Mann League of the U.S. v. Board of Public Works*, 242 Md. 645, 220 A.2d 51 (1966), cert. den., 385 U.S. 97.

In the present case, as the court viewed it four colleges—all church-related—either had or were about to receive aid under the statute. The first, Hood College, is affiliated with the United Church of Christ. Attending to the criteria above, however, it was found that there was such an insignificant relationship between the two, that Hood College must be deemed nonsectarian. The other three colleges, two of which were Roman Catholic and the third Methodist affiliated were, on the other hand, very closely tied to their respective religions as determined by the criteria just stipulated by the Maryland court. In the latter three cases, the court held that the schools may properly be deemed sectarian and, as such be prohibited from receiving public aid by the Establishment clause of the First Amendment.

It is worthy of note that, at least by the Maryland standard, a college or university may be church-affiliated and still be considered nonsectarian so as to be included in such grants. Again, what the Maryland court apparently is saying is that which has been said in so many other cases, namely that on matters of this nature, we are talking of questions of degree rather than absolutes.

Three Judges dissented from the majority. Justices Hammond, Horney, and Marbury argued that the decisive issue was whether state assistance to secular educational facilities of a church-related or church-controlled college amounted to an establishment of religion. The grants under consideration were made pursuant to a long established tradition to further a secular public purpose, and the aid or benefit to religion would be slight and incidental. The minority argued again that the important point was that different people observed different degrees of incidental aid to schools under the same programs. Thus, we essentially are forced into an extremely subjective type of analysis when dealing with matters in this area, the minority warned.

Conclusions

It should be patently obvious that no one has a crystal ball of the quality necessary to provide any major conclusions in this area at the present time, particularly since two cases have been docketed and are pending before the Supreme Court of the United States and may, in fact, be decided as this paper is being given. But it is worthy of note that one of the largest federal programs, and certainly the first major federal program to general education, is in a sense jeopardized in its existing form by litigation presently before the Court. Thus, the Court's decision will have enormous signifi-

cance and bearing on these programs not only to parochial and private schools but also to public schools because of the billions of dollars in federal funds involved. It should also be clear from the references to these cases and the administrative decisions discussed that many of the subtle key words and phrases have no universal agreement either on the part of the courts, the bar, or the various religious or general interest groups themselves. This is indeed a fundamental theoretical argument, which like most in American constitutional law will never, in all probability, be completely settled, but will be dealt with on the basis of a case to case approach using the degree-to-degree method of analysis. In this sense, general federal aid to education does not differ from any of the other major constitutional debates which we have had, and will continue to have, throughout the history of this nation so long as it remains a constitutional democracy. Areas such as debates over federalism, civil liberties, for example, are on the same order of magnitude. It is, I think, important to keep in mind that while proponents differ sharply, and their arguments oftentimes take on a quality of more heat than light, it should be remembered that the antagonists in the controversy are men of good will, and their positions are taken in the best of faith. This, of course, makes a general solution even more difficult to find.

The famed legal scholar Paul A. Freund, in a significant article in the Harvard Law Review[139] takes the recent Supreme Court decisions in *Board of Education v. Allen* as a starting point and examines the constitutionality of state support for church related schools in light of three policies behind the First Amendment's religious guarantees: Voluntarism is mutual abstention, and government neutrality. He concludes that the interest of both Church and State would best be served were the court to constrict and limit the future operation of the *Allen* doctrine.

As he notes, in a rather perverse sense, public school education is itself necessarily religious, in that it is an example of so-called secularism. Secularism, he points out, is in a sense a form of religion, however degraded one might think it is. He goes on to note that if a state school worships the Anti-Christ, equal support is due to a school that worships Christ. But he points out that we must be careful not to construct a syllogism out of a metaphor of this kind, anymore than out of the countervailing metaphor "the wall of separation."

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[139]Paul Freund, "Public Aid to Parochial Schools," 82 *Harvard L. Rev.* 1680 (1969).

To say that the Americans worship what William James calls "the bitch goddess success" is as Freund explains, "not to assert anything relevant to the usage of 'religion' in the First Amendment." He argues that the notion that the absence of Crucifixes or the Torah in a public school is in itself a religious statement, is merely a play on words or an idiosyncratic characterization similar to the Jehovah Witnesses' view in the flag salute cases. Moreover, he argues, to claim that moral training cannot be separated from religious training in a constitutional sense is to contradict the existence of the one reference to religion in the constitution's text prior to the Bill of Rights—that no religious test "shall be required" for any office of Trust under the United States."[140]

As Freund sees it, if good moral character is relevant to holding a position of public trust, and if religious training is essential to solvent morality, it would have been reasonable to allow a religious test as at least a presumptive assurance of moral qualification.

In keeping with the point made earlier in this study, Freund notes that most parents who avail themselves of the public schools are actually, at the same time anxious to show that their children shall receive religious training. But it is their notion that such training shall occur outside the community of the school, as in the home, church or in after hour church schools or Sunday school. This, of course, makes the idea of reciprocity or neutrality much more complex. Public aid to parochial schools maintained by Roman Catholics or Lutherans or Orthodox Jews would, in certain measure, benefit the religious mission of these faiths because religion in our present hypothesis is intertwined in all their instruction. As a counterpart, Freund notes, the "Baptist and other separationists could rightly insist that equalization would require some contribution by the state to their own church or Sunday school, which performs the same mission that would be subsidized in the parochial schools of other denominations. It would be ironic if the Baptist separationists who triumphed over the Anglican theocrats in the historic struggle against establishment in Virginia, should find themselves disadvantaged in the name of a Constitution which repudiated establishment."

The problems presently before the Supreme Court, particularly in the *Lemon* case, while not subject to total analysis by Freund, are nonetheless not completely ignored; many of the problems were being alluded to a year before the case will be decided. Concerning

[140] U.S. Constitution, Article VI.

provisions of textbooks not on loan or not in form requested by pupils, or books of a character or for use in schools different from the circumstances present in the New York case, or as in Pennsylvania, a direct payment to so-called "secular" teachers in parochial schools and unconditional grants for specified areas of learning, the Court is confronted with a minimum of three courses of constitutional action. The first is to hold that federal or public aid is mandatory to private and parochial schools. The second course of action would be for the court to hold that such public aid to private and parochial schools is permissible and the third, of course, would be to hold such public aid impermissible. As Freund analyzes the situation facing the Court, the mandatory course seems least acceptable, notwithstanding the logical course of the argument from the "neutrality" statement in several judicial decisions. A choice between the permissible and the forbidden, in Freund's analysis, is in essence a choice between whether to leave the issue to the political process of the state or to defuse the political issue. He explains that he is normally disposed, in such gray areas of constitutional law, to let the political process function with the effect that whatever the state legislature should choose to do would be controlling. He goes even further and argues that in dealing with even basic guarantees of the Bill of Rights, under most circumstances he would tend to reject a single form of national compliance and leave room for other methods of implementation, whether in pretrial interrogation under the privilege against self incrimination, or libel of public figures under freedom of the press, or exclusion of evidence under the search and seizure guarantee.

The conclusion with which I concur in my analysis is that the Religious guarantees of the First Amendment are of an entirely different order. While political debate and division is normally a wholesome process for reaching viable accommodation, political division on religious lines is one of the principal evils which the First Amendment was designed to forestall, as Freund, in my judgment, correctly points out.

> Although great issues of constitutional law are never settled until they are settled correctly, still, as between open-ended ongoing political warfare and such binding quality as judicial decisions possess, I would choose the latter in the field of God and Caesar and the public treasury. This basic preference may help to account for what otherwise may seem a too rigid and not sufficiently permissive view of constitutional commands.[141]

Our role is essentially that of the uncomfortable observers who

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[141] *Op. cit.* at p. 1692.

are not in anyway the captains of their own fate. Until the Supreme Court reports on the matter of federal aid to parochial and private schools, provided for under the Elementary and Secondary Education Act, the matter is not only clouded but the entire educational system of the United States is befuddled.

THE LEGAL STATUS OF STUDENT TEACHERS AS A SPECIAL PROBLEM IN SCHOOL ADMINISTRATION

By Bobby D. Anderson*

The state legislature generally writes school laws in broad terminology and creates a state agency to develop specific rules and regulations to govern the public schools. The legislature might define the term "teacher" but leave the specific requirements for a teaching certificate to the determination of the state department of education. A matter of some importance, but often overlooked by both the legislature and state department of education, is the legal status of the practice teacher.

The problem is to determine how to provide the field experience necessary for potential teachers and at the same time provide the legal protection they deserve while working in the practicum situation.

The purpose of this paper is to present the problem, and analyze recent legislation in some states and make recommendations to help solve the problem.

Missouri began certifying student teachers in the Spring of 1969. The certification is handled through the state department of education. The states of North Dakota, North Carolina, Iowa, Kansas, and Tennessee also passed legislation giving legal status to student teachers in 1969 and 1970.

Recommendations

Each state legislature should ascertain if their statutes adequately define the legal status of student teachers. Appropriate action should be taken to remedy any existing deficiency. The legislation should be written to give student teachers the same legal status as certificated teachers.

University and College Departments responsible for the assignment of student teachers to work in the public schools should inform students concerning their legal status.

The Association of Teacher Educators should work through state teacher associations to exert pressure for passage of legislation giving legal status to student teachers.

*Professor of Educational Administration, University of Southern Mississippi.

SPECIAL PROBLEMS OF SCHOOL ADMINISTRATION
SCHOOL BOARD POLICIES—CLASSIFICATION AND UPDATING

By Dr. Walter L. Hetzel*

The number of problems school board members have to deal with is on the increase. Not only are there more problems, these problems individually are more severe than they used to be. Consequently, it becomes increasingly important for school boards to develop effective procedures for dealing with them. Probably one of the first, if not the first, effective procedure involves having written local board policies that are well classified and indexed and which are continuously updated. I have chosen to talk about the classification, indexing, and updating of school board policies because I believe a look at the development of this subject and a sharing of information about it will have a value for us.

Some school districts have had written school board policies for a number of years. However, the push to get all school boards to come up with written policies that are systematically classified and updated has taken place during the last decade or two. The early procedures for doing this were strictly on a local, individual school district basis with each such district taking care of the problems in a way that seemed necessary and effective in the particular district. This, of course, resulted in many different procedures and also a great variance of what was included in the written board policies.

Leaders in the field of education soon recognized the importance of well-done, written board policies. They also recognized that many school boards and administrators needed help in the development of these policies. Beyond that, they felt that a trend toward some uniformity in the classification and indexing of policies as well as a procedure for keeping them up-to-date would be very helpful to boards of education everywhere. Consequently, state school board associations, many universities, and some private organizations moved into the field to provide the needed service. I'll briefly comment on what took place in Iowa because I am more familiar with that state than with other states. However, I believe much the same thing happened in other states.

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*Superintendent of Schools, Ames, Iowa.

The Iowa Association of School Boards came out with an outline guide for the development of written policies in the early 1950's. This guide provided for seven chapters with from seven to seventy items under each chapter. The number of items could, of course, be expanded. I'll quickly run through the chapter headings: Chapter 1—Organization and Administration; Chapter 2—Instructional Services; Chapter 3—Business Services and Fiscal Policies; Chapter 4—Public Relations; Chapter 5—Pupil Policies; Chapter 6—Policies for Certified Personnel; and Chapter 7—Policies for Non-Certified Personnel. The subject matter in each chapter was classified by a decimal system using two decimals; the chapter being indicated by a whole number as 3 for Chapter 3, then a decimal for the section, and then another decimal for the subsection.

In the early 1960's the Iowa Center for Research at the University of Iowa developed some model board policies and a system for classifying and indexing those policies and other policies that board members might wish to have in their local manuals. These policies were divided into ten classification groups similar to chapters with each group numbered from 100 to 1,000—the first being 100, the second 200, the third 300, etc. Decimals were used following the 100 identification classification to classify the subjects included under each of the ten major classifications. Six of the ten major classifications were about the same as the Iowa Association of School Boards' chapters.

Another system, the Davies-Brickell system, was not, as most of you probably know, an Iowa-developed system but one that was developed in the East. It is a commercial system that is used in a number of Iowa schools and, I am sure, schools in many other states too. It divides board policies and regulations into two parts —Part One, Operation of the School System, and Part Two, Operation of the Board of Education. Part One, Operation of the School System, is subdivided into six articles: Community Relations, series 1,000; Administration, series 2,000; Business and Non-Instructional Operations, series 3,000; Personnel, series 4,000; Students, series 5,000; and Instruction, series 6,000. Part Two, Operation of the Board of Education, is divided into two articles: Article 8, Internal Operation of the Board of Education, series 8,000; and Article 9, By-Laws of the Board, series 9,000. Decimals are not used to indicate the classified and indexed items included within each of the series, but rather whole numbers are used. This, of

course, makes possible 1,000 individual items under each article or series without the use of decimals.

The National Association of Educational Secretaries saw the need for some standardized procedures in the filing and retrieval of educational material in school offices. Consequently, they produced the manual *File It Right.* This, of course, is not in the realm of board policy, but it does indicate an attempt to help bring system and order to the filing and retrieval of material in school offices. It also promotes some standardization of procedure. This *File It Right* manual sets up 29 classifications under which 939 items called "references" were to be filed.

The National School Boards Association has recently developed an Educational Policies Service for boards of education that includes not only manuals and procedures for classifying and indexing board policies but also a system of updating policies through regular bulletins and a clearinghouse for exchanging board policies that have been developed by boards over the country. This Educational Policies Service of the NSBA, which is known as EPS, was developed in cooperation with the U. S. Office of Education and other organizations and agencies to assist both those school districts that do not have written policies and also those that do have through an attempt to standardize procedures and exchange information. This service divides the whole field of school board policies into 13 groups or classifications. Each of these is identified by a letter A through M. The number of classifications, 13, is somewhat larger than some of the earlier classification systems. The 13 major classifications are School District, identified A; School Board Operations, identified B; General School Administration, identified C; Fiscal Management, identified D; Business Management, identified E; Facility Expansion Program, identified F; Personnel, identified G; Negotiations, identified H; Instructional Program, identified I; Students, identified J; General Public Relations, identified K; Inter-Organizational Relations, identified L; and Relations with Other Educational Agencies, identified M.

There are more than 1,400 terms known as Descriptors that are classified under these 13 basic classification divisions. These terms or Descriptors were scientifically chosen from more than 10,000 terms from many sources. Because of the growing importance of ERIC, the Educational Resources Information Center, the ERIC Thesaurus was used wherever possible to make for a commonly used and understood designation of terms. Each of these Descrip-

tors or terms in the EPS/NSBA School Board Policies System is given a letter index and classification identification rather than a numerical or decimal identification because this makes for more flexibility, there being 26 letters compared to ten digits. Also, because with no decimal points it was believed the likelihood of errors in reproduction and filing would be reduced.

I have very briefly attempted to touch on the importance of written school board policies and the steps that have been taken over the country to provide them. In some states less than one-half of the school boards have written policies. In those states where they have been developed to a somewhat more sophisticated level there still is much inconsistency in the procedures used to classify the policies. There is great need, it seems to me, for school boards to exchange the policies they have ground out in the areas where problems are great. This can be done more effectively when there is a somewhat uniform system of classifying, coding, collecting, and disseminating. It seems to me that the N A has taken the necessary steps to bring this about.

Whenever a board of education takes formal action, it is adopting a policy with reference to the subject at hand at that time. The complete and bound board minutes for a fiscal year for many boards make a volume as large as the session laws of a state legislature. Many, in fact most, of these board actions are too limited in scope to justify inclusion in board policy manuals.

Some code editors believe state departmental rules, municipal codes, and school board policy manuals should have the individual rule, ordinance, or board policy keyed to the statute or higher authority that authorizes it. This, of course, increases the indexing task.

A discussion of this broad field of school board policies procedures by the attorneys, school board members, and administrators here at NOLPE should be interesting and useful.

Special Problems of School Administration: INTEGRATION OR SEGREGATION OF "OTHER" MINORITY GROUPS

By Stanley G. Sanders*

Determination of boundaries or zones for attendance areas and policies for assignment of pupils to the several schools of a district has frequently posed a difficult problem for school administrators. The difficulty of the task increases as populations and enrollments change so that changes in assignments are required. Even if the problem is solved for one year, shifting populations of children may cause it to arise again and again each year.

In recent years, administrators have been required to give careful consideration to racial implications when these assignments are made. Since the Brown decision[1] it has become clear that decisions must be made so that they avoid any semblance of racial discrimination or segregation. In Southern states, where de jure segregation existed in the past, administrators have been required to readjust pupil assignments in order to achieve a unitary school system. In many Northern cities, administrators have felt equally constrained to avoid or eliminate de facto segregation. In many cases this de facto segregation threatened to become more and more pervasive, as changing population patterns "changed the complexion" of neighborhoods.

Generally, the problems arose over differentiation between two races, Negro and white. It now appears that administrators in many districts may be required to consider the existence of situations in which other minority groups are segregated or discriminated against, in schools which are located in neighborhoods which are populated by homogeneous ethnic groups. In parts of the Southwest, this may involve children of Mexican-American descent; in parts of the Northeast children of Puerto Rican parentage; in Florida, children of former residents of Cuba; in a number of places there are areas inhabited by American Indians; and many localities have other less common "colonies" of recognizable minority groups with common national or ethnic ancestry.

The fact that this concern is already prevalent is illustrated by the contents of a recent bibliography of publications on school in-

[1] *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686 (1954).

tegration, prepared by the Center for Urban Education. It contained a section on "Spanish-Americans" which listed fifty-five recent articles and publications, and a section on "American Indians" which contained thirty-seven such references.[2]

It seems obvious that constitutional guarantees which are applied to Negroes must also be assured to other minority groups, where they exist. However, there have been only a few court cases bearing on this point.

Pre-Brown Cases

In the classic case of *Gong Lum v. Rice,* the Supreme Court upheld the viewpoint of Mississippi courts that a Chinese child came under the classification of "colored" and could be assigned to schools for Negroes. Since these schools were available in every county, her constitutional rights were not violated when she was not permitted to attend white schools, under the "separate but equal doctrine."

Since 1905, the State of Texas has had a statute similar to that of many Southern states, providing that "No white child shall attend schools supported for colored children, nor shall colored children attend schools supported for white children. The term . . . 'colored children' as used in this title, includes all persons of mixed blood descending from Negro ancestry."[4] An early case held that, under this statute, school authorities have no power to arbitrarily segregate Mexican children, assign them to separate schools, or exclude them from schools maintained for children of *other white races,* although local school authorities may maintain separate schools for Mexican children where local conditions are such that the work of teaching is in that manner made more effective, subject to the restriction that segregation of pupils must not be made arbitrarily on the basis of race.[5]

In one criminal case, the Texas Supreme Court held that Mexican Americans are "white." The Federal Supreme Court reversed the decision, found that Mexicans were delineated as a separate and distinct group in the community, and held that this group was

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[2]Meyer Weinberg (Ed.), *School Integration: A Comprehensive Classified Bibliography of 3,100 References.* New York: Center for Urban Education, 1968. pp. 76-80.
[3]275 U.S. 78, 48 Sup.Ct. 91 (1927).
[4]*Vernon's Annotated Texas Statutes* Art 2900 (Acts 1905, p. 263).
[5]*Independent School District v. Salvatierra,* 33 S.W. 2d. 790 (Texas Civil Appeals).

discriminated against by virtue of the fact that no Mexican in the county had served on a jury in twenty-five years.[6]

In 1948, another Texas case was tried in Federal District Court. In this unreported case, a group of Mexican Americans brought suit to enjoin the defendant school district from segregating them into separate schools. The court held that the suit was a proper class action and that the segregation of children on the basis of Mexican descent did in fact violate the Fourteenth Amendment.[7] In 1950 an Arizona District Court declared the same practice unconstitutional and permitted the suit to continue as a class action.[8]

1970 Cases

During the current year, three cases have developed in Texas which involve alleged discrimination against, and segregation of, Mexican American pupils.

The United States government has recently taken cognizance of discriminatory practices by intervening in the case of *Perez v. Sonora Independent School District.*[9]

The Houston Independent School District has been under Federal Court integration orders since 1956, with numerous hearings, appeals, and court orders. This year the Fifth Circuit Court rendered a decision revising the District's desegregation plans. This latest order involved pairing certain elementary schools with predominantly Negro enrollments and certain other elementary schools classified as "white" but enrolling large percentages of children of Mexican-American descent. A group of these children and their parents have become new plaintiff-intervenors in the case, asking that they be recognized as a "third" group or class, along with Negroes and whites (or Anglos, as they are known in Texas)[10] and that integration involve all three groups.

A decision and order has been handed down by the Federal District Court for the Southern District of Texas in the case of *Cisneros v. Corpus Christi Independent School District,* holding that Mexican-Americans do constitute an identifiable ethnic minority, that they do fall within the protection of the holding in the Brown

[6]*Hernandez v. State of Texas,* 347 U.S. 475, 74 S.Ct.667 (1954).
[7]*Delgado v. Bastrop,* Civil Action No. 388 (W.D.Texas, June 15, 1948).
[8]*Gonzales v. Sheeley,* 96 F.Supp. 1004 (D.C.Ariz., 1950); See also *Mendez v. Westminster School District of Orange County,* 347 F.Supp. 544 (D.C.Cal., 1946), affd. 161 F.2d 774 (1947).
[9]Civil Action No. C.224 (N.D.Texas, San Angelo Division, 1970).
[10]*Delores Ross v. Robert Y. Eckels et al.,* Civil Action No. 10, 144 (1970).

case, and that there was segregation of Mexican Americans. Furthermore, the Court ordered specific changes in pupil assignment policies and zones and in faculty and staff assignments in order to eliminate the discriminatory practices, and these orders are being carried out in the school district this year.[11]

De Facto or De Jure Segregation?

In the original cases of separate schools for Negro and white students, segregation was easy to recognize. Separate schools were officially maintained by state law or by action of the state officials in local school districts. In the cases of "other" minority groups, segregation is seldom so complete, so official, or so purposeful. It is sometimes difficult to tell whether segregation of a racial or ethnic group exists, or whether there is merely a degree of racial imbalance which results from housing patterns and from the uniform application of school zoning and pupil transfer policies. Where true de facto segregation of the latter type exists, it is probably still true that the board is not required to correct the imbalance.[12]

However, where it can be shown that official actions of the board have caused, contributed to, or maintained segregation it becomes, in effect, de jure segregation, and the board has a responsibility to eliminate it. As early as 1961, it was recognized that "covert de jure" segregation was not acceptable as de facto.[13] It has been found that even freedom of choice for both pupils and faculty may be discriminatory in a city whose residents live in segregated sections.[14] Last year's Denver case is probably the best example of a court holding the school board responsible for acts of commission and omission which result in segregation.[15]

The trend seems to be for the courts to place more and more responsibility upon school officials to avoid any semblance of discrimination or segregation of minority groups.

Furthermore, the Supreme Court has made it perfectly clear that, where illegal segregation has existed, the local board has an

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[11]Civil Action No. 68-C-95, June 4, 1970.
[12]*Deal v. Cincinnati Board of Education*, 369 F.2d. 55 (6 Cir., 1966).
[13]*Taylor v. Board of Education of City School District of New Rochelle*, 294 F.2d 36 (2 Cir., 1961).
[14]*Swann v. Charlotte-Mecklenburg Board of Education*, 300 F. Supp. 1359 (U.S.D.C., W.D., N.C., 1969).
[15]*Keyes v. School District No. One, Denver, Colorado*, 303 F. Supp. 279 (U.S.D.C., D. Colo., July 31, 1969) and also 303 F. Supp. 289 (U.S.D.C. D.Colo., August 14, 1969).

obligation to correct the discriminatory practices *immediately*. The "all deliberate speed" criterion is a thing of the past.[16]

This obligation would probably be applied to cases of segregation of "other" minority groups as well as Negroes. In the Corpus Christi case[17] the District Court did not hesitate to delay the opening of school for a short time in the Fall in order to accomplish the necessary changes in pupil and faculty assignments. Furthermore, when school buildings were damaged by Hurricane Celia in August, the Court caused major repairs and renovations to be delayed until their effect upon integration could be considered.

HEW Guidelines and Other Minority Groups

The policies and guidelines of the Department of Health, Education and Welfare for determining compliance with Title VI of the Civil Rights Act of 1964 have been interpreted in a memorandum issued by the Director of the Office for Civil Rights of the Department, dated May 25, 1970. This memorandum is addressed to school districts with more than five percent national origin-minority group children. It states that reviews conducted in school districts with large Spanish surnamed student populations have revealed a number of common practices which have the effect of denying equality of educational opportunity to Spanish-surnamed children, and that similar practices exist in other locations with respect to disadvantaged pupils from other national origin-minority groups, for example, Chinese or Portugese. The memorandum points out that districts have a responsibility to provide affirmative steps to correct English language deficiencies of these students, where they exist, and to refrain from special assignments, tracking or grouping of these students because of their language deficiencies.

This attention of the Department of Health, Education and Welfare becomes even more pertinent in light of court decisions which call upon local districts to give great weight to, and reliance upon, the expertise and guidelines of HEW.[18]

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[16] *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 12 L.Ed. 2d 256 (1954); *Green v. County School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed. 2d 716 (1968); and *Alexander v. Holmes County Board of Education*, 90 S.Ct. 29, 24 L.Ed. 19 (1969).

[17] *Cisneros v. Corpus Christi Independent School District*, supra.

[18] *Singleton v. Jackson Municipal Separate School District*, 348 F. 2d 729 (5 Cir., 1965); *United States v. Jefferson County Board of Education*, 372 F. 2d 385 (5 Cir., 1967); *Whittenberg v. Greenville County School District*, 298 F. Supp. 784 (U.S.D.C., S.C., 1969); *Conley v. Lake Charles School Board*, 303 F. Supp. 394, (U.S.D.C., W.D.La., 1969).

Conclusions

It seems apparent that provisions which forbid segregation of, or unequal educational opportunity for, Negro school children may also apply to other minority groups in many school districts throughout the nation. Where such discrimination exists, and where it may be due to any official acts of school officials, these officials are legally obligated to remove and correct such dificiencies so as to operate unitary school systems.

Legal advisors to school officials would do well to prepare board members and administrators for possible activity in this field.

Past policies and practices, used in establishment of attendance zones and boundaries and in determination of pupil and faculty assignments, may no longer be acceptable.